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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, *et al.*,
*Petitioners,*

v.

JOHN JORDAN, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR RESPONDENTS

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## BRIEF FOR RESPONDENTS

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## OPINIONS BELOW

The opinion (App. 117-120) and judgment (App. 122-128) of the District Court are unreported. The opinion of the Court of Appeals for the Seventh Circuit is reported at 472 F.2d 985 (7th Cir. 1973), and is in the appendix to the Petition.

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

### Statutory Provisions[1]

Section 1182 (a)(5)(8) and (13) of the Social Security Act, 42 U.S.C.A. §1382(a)(5)(8) and (13) (1969 ed.)

"(a) A State plan for aid to the aged, blind, or disabled and medical assistance for the aged, must–

* * *

(5) Provide (A) such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan.

* * *

(8) Provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals,

* * *

(13) Include reasonable standards, consistent with the objectives of this subchapter for determining eligibility and the extent of aid or assistance under the plan."

Section 1102 of the Social Security Act, as amended, 42 U.S.C. §1302

"The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this

[1] In the Brief for Petitioner (hereinafter "Pet. Br.") at pp. 2-3, 42 U.S.C. §604 is set forth. That section relates to the AFDC program which is not at issue in this case.

chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter."

**Federal Regulations**

45 C.F.R. §206.10(a)(3)[2]

"§206.10 *Application, determination of eligibility and furnishing of assistance.*

"(a) *State plan requirements.* A State plan under Title I, IV-A, X, XIV, XVI, or XIX of the Social Security Act must provide that:

* * *

"(3) A decision will be made promptly on applications, pursuant to reasonable State-established time standards, not in excess of 30 days for OAA, AFDC, and AB (and in AABD and MA as to the aged and blind) and 60 days in APTD (and in AABD and MA as to the disabled). Under this requirement, the applicant is informed of the agency's time standard in acting on applications, which covers the time from date of application to the date that the assistance check, or notification of denial of assistance or change of award, or the eligibility decision with respect to medical assistance, is mailed to the applicant or recipient. . . ."

Department of Health, Education and Welfare, Handbook of Public Assistance Administration, Part IV, Sections 2200 and 2300

"2200. Requirements for State Plans.

"A State Plan for OAA, AFDC, AB, APTD, or AABD must provide that:

* * *

[2] Effective Oct. 15, 1973, the federal time standards in processing aged and blind applications will be 45 days. 38 Fed. Reg. 22009 (Aug. 15, 1973).

"(b)(3) Prompt action will be taken on each application, within reasonable State-established time standards (which, effective July 1, 1968, will not exceed 30 days in AFDC, OAA, and AB, and as to aged and blind in AABD, and 60 days in APTD and as to disabled in AABD).

"2300.

"(b)(5) Applicants are informed of the agency's time standard for promptness in acting on applications (see IV-2200(b)(3)) which is specified in agency policy, and that it covers the time from the date of application to the date the applicants are determined eligible and receive their first assistance check or notice of denial of assistance, and of their right to request a hearing before the State agency if the standard is not met regarding their applications."

**State Regulations**

Illinois Categorical Assistance Manual, Illinois Department of Public Aid

"8255. *Initial Awards*

"Initial awards may be new grants, reinstatements, or certain types of resumptions. They can be effective for the month in which Form FO-550 is signed but for no prior period except under the conditions described in Manual topics 8256.2 and 8256.3.

"8255.1. *New Grants*

"A new grant is the first grant authorized after an application has been accepted in a case which has not previously received assistance under the same assistance program. It may be authorized for the month in which Form FO-550 is signed but not for any prior period unless it meets the exceptions enumerated in Manual Topic 8256.3.

"4004.1[3]

"Except for DA and MA-NG(D) cases which have a time standard of 45 days, the time standard for disposition of applications is 30 days from the date of application to the date the applicants are determined eligible and the effective date of their first assistance or are determined ineligible and receive a notice of denial of assistance . . . ."

## QUESTIONS PRESENTED

1. In a suit against a state public aid official does the Eleventh Amendment, which does not deprive the federal court of the power to enjoin the state official from enforcing an illegal state regulation and the power to require the state official to comply in the future with federal law, nevertheless, deprive the federal court of the power to grant equitable restitution as part of the appropriate equitable relief in the case?

2. If this is a suit against the State of Illinois, has Illinois consented to this suit in federal court (a) by defending the action in the trial court and not contesting in a timely manner the jurisdiction of the court, and (b) by voluntarily choosing to participate in the AABD program, and receiving federal funds therefor?

3. Did the trial court in the exercise of its traditional equitable powers and in furtherance of the purposes of the Social Security Act, have the authority to require equitable restitution of AABD benefits wrongfully denied?

4. Did the Seventh Circuit err as a matter of law in upholding the restitution provisions of the judgment of the trial court?

[3] This section is misquoted in *Jordan v. Weaver*, 472 F.2d at 987 n.2.

## STATEMENT OF THE CASE

This case was brought by John Jordan, a needy disabled person, on behalf of a class of needy aged, blind, and disabled persons, whose applications for Aid to the Aged, Blind or Disabled (hereinafter "AABD") were delayed in processing, and who were denied AABD benefits to which they were entitled in contravention of federal requirements under the AABD program. Illinois voluntarily chose to participate in the AABD program under the Social Security Act, 42 U.S.C. §1381-1385 (1969 ed.),[4] and in so doing, Illinois admittedly agreed to comply with the provisions of the Social Security Act and regulations thereunder. (App. 42, 59, par. 18)

Specifically, mandatory federal regulations, issued in February, 1968, to become effective July 1, 1968, prescribed maximum permissible time standards for processing AABD applications. (R. Item 13, and Exhibit A, attached to Item 39, Handbook Transmittal No. 139, Department of Health, Education and Welfare, Handbook of Public Assistance Administration, Part IV, Sections 2200 (b)(3) and 2300(b)(5)). The regulations required that eligibility determinations had to be made within 30 days for the aged and blind, and 60 days for the disabled. In addition, for those found eligible, assistance had to be received by the eligible person within the time periods.[5] As a necessary corollary, for those eligible persons whose applications were delayed in processing beyond the time

---

[4] Effective January 1, 1974, the AABD program is being replaced, 42 U.S.C. §1381 *et seq.* (Supp. 1973).

[5] The regulations were amended to require mailing instead of receipt within the time periods. 45 C.F.R. 206.10(a)(3) (eff. Feb. 27, 1971).

periods through no fault of the applicant, the regulations required assistance when approved, to be effective as of the last day of the time period in which the application should have been acted upon.

The defendant, Harold O. Swank, then Director of the Illinois Department of Public Aid, knew that these regulations were mandatory and binding on the State, and that they were effective July 1, 1968. (App. 85, 89) He also knew that these federal requirements were subsequently not complied with in Illinois and that substantial numbers of needy aged, blind, and disabled persons in the numerous counties of the State of Illinois did not have their applications processed within the maximum time periods permissible under federal law. (App. 86, 87, 89)

More importantly, he was fully aware that substantial numbers of *eligible* aged, blind, and disabled persons whose applications were not processed within the maximum permissible time periods but were subsequently approved, were being deprived of AABD assistance to which they were entitled under federal law, as a result of the department regulations (Sections 8255 and 8255.1, Illinois Categorical Assistance Manual, Illinois Department of Public Aid) which prohibited the authorization of AABD assistance for any period prior to the month in which an application was approved.[6] (App. 85-89) For example, the application of the named plaintiff, John Jordan, a mentally retarded sixty-one year old, was pending almost four months, and was finally acted upon and approved in January 1971 only after the court

[6]The net effect of these Illinois regulations was to create a financial disincentive to the prompt processing of applications. For every month that an application was delayed, the department saved the expenditure of the monthly entitlement of the eligible recipient.

required such action. (App. 36) Even then, based upon Sections 8255 and 8255.1, he was granted assistance effective only as of January 1, 1971, the month in which his application was approved, and was denied AABD assistance for the months of November and December, 1970, which he should have received in accordance with the federal requirements that the effective date of assistance was the last day on which his application should have been acted upon. His case is typical of thousands of other AABD applicants.

Significantly, the unlawful delay in processing of John Jordan's application and the unlawful denial of AABD benefits to which he was entitled, came after the entry of the judgment in *Rodriguez v. Swank*, 318 F. Supp. 289 (N.D. Ill. 1970) (judgment entered Oct. 29, 1970) (App. 22-29). In that case involving a class of AFDC applicants, a three-judge court had already ruled that (1) the federal regulations prescribing maximum time periods for processing applications were mandatory and binding and future compliance therewith was required, (2) assistance had to be effective as of the last day of the maximum time period for processing applications when the application was not approved within the permissible time period, (3) the state regulations (Sections 8255 and 8255.1) barring assistance for any period prior to the month in which the application was approved were "null and void," and (4) members of the class were entitled to restitution of benefits wrongfully withheld. Notwithstanding this judgment, the state welfare director, insofar as AABD applicants were concerned, continued to treat the same federal regulations as merely advisory, did not comply therewith (App. 30), did not require that assistance be effective as of the last day of the maximum time period for processing the application when there was a delay in processing beyond the requisite time period, and

continued to apply in cases involving AABD applicants the state regulations which had been declared null and void.

To remedy this defiance of federal law, John Jordan, individually and on behalf of all others similarly situated, filed the instant suit on January 12, 1971. In pertinent part, the complaint sought to enforce the federal time regulations for processing applications by enjoining the widespread failure to comply with them, sought to enjoin the enforcement of Sections 8255 and 8255.1 as applied to AABD applicants, and further sought to obtain all AABD benefits wrongfully withheld. (App. 5-16) Immediately, plaintiffs sought and secured a temporary restraining order requiring the defendants to comply with the mandatory federal time standards for processing all future AABD applications. (App. 17-21, 31-36)[7] Next, plaintiffs secured a preliminary injunction establishing that "the entitlement of all eligible AABD applicants in the State of Illinois shall attach no later than the thirtieth (30th) day after application as to aged and blind applicants, and no later than the sixtieth (60th) day after application as to disabled applicants" in cases where eligibility was determined subsequent to the maximum time period. (App. 78) Further, the court declared null and void the state regulations (including Section 8255) inconsistent with the terms of the preliminary injunction. (App. 79)

Subsequently, on plaintiffs' motion for summary judgment the court granted, *inter alia*, a permanent injunction requiring compliance with federal time standards and restitution of AABD benefits wrongfully denied AABD recipients from July 1, 1968, the effective date of

[7]Pages 35 and 36 of the Appendix are improperly transposed.

the federal regulations, to April 16, 1971,[8] the date on which the trial court had preliminarily enjoined the enforcement of the illegal state regulations barring assistance prior to the month in which a grant was initially approved. (App. 117-120) The Court rejected the defendants' contention that the release of payments wrongfully withheld should not go "back any further than the date this lawsuit was filed." (App. 107) Contrary to the repeated representations of petitioner (Pet. Br. at 4, 7, 8), plaintiffs never sought not obtained compensatory damages. (App. 122-128)

On appeal to the Seventh Circuit, the state welfare director, in challenging the restitution provisions, took a different position from that presented to the trial court prior to judgment. He argued that restitution of any illegally denied AABD benefits was improper for two reasons: (1) the Eleventh Amendment barred such relief and (2) the judgment of the court should be given prospective relief only. The Eleventh Amendment defense was raised notwithstanding the fact that at no time prior to the entry of the judgment of the district court (App. 122-128), or even prior to the filing of the notice of appeal, did the defendant challenge the jurisdiction of the trial court on Eleventh Amendment grounds. The Seventh Circuit rejected the Director's contentions and affirmed the restitution provisions of the lower court judgment. *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973).[9] This Court granted certiorari, *sub nom. Edelman*

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[8] There is a typographical error in the judgment where it reads on the top line April 16, 197"2". (App. 125) This error is carried forward by petitioner at the top of page 7 of their Brief.

[9] Other issues raised on the cross-appeal were rejected by the Seventh Circuit. These issues are not before this Court.

*v. Jordan*, 93 S.Ct. 2776 1973) and shortly thereafter, Mr. Justice Rehnquist denied the petitioner's application for a stay with respect to the prospective relief, but granted a stay of the provisions relating to restitution. *Edelman v. Jordan*,____U.S.____ (July 19, 1973).

## SUMMARY OF ARGUMENT

This suit was brought on behalf of a class of needy aged, blind, and disabled persons against the Director of the Illinois Department of Public Aid to enjoin certain state practices and regulations which allegedly violated federal requirements for processing AABD applications, and to obtain equitable restitution of AABD benefits wrongfully denied incident to these unlawful practices. The Director concedes that under the doctrine of *Ex Parte Young* the federal court, notwithstanding the Eleventh Amendment, may enjoin the Director from enforcing the state regulations, and may also require the Director to comply with the federal time standards for processing of AABD applications in the future. Respondent AABD recipients maintain that the relief of equitable restitution, incident to the other equitable relief in the case, is similarly not barred by the Eleventh Amendment. Under the doctrine of *Ex Parte Young*, the Director is stripped in all respects of his official position when acting in violation of law, and, accordingly, the federal court may grant whatever equitable relief is appropriate under the circumstances. Moreover, the immunity of a state under the Eleventh Amendment is from a "suit" in federal court and not from certain types of equitable relief. The fact that equitable relief against a state official may have an impact upon the state treasury is not relevant to the question of the scope of state immunity from suit in federal court under the Eleventh Amendment.

Assuming, *arguendo*, that this is a suit against the State of Illinois, the state has consented to this suit in federal court by defending this action in the trial court without a timely challenge to the jurisdiction of the court. The accepted principle that a state may be sued with its consent must mean that it is necessary to raise the absence of consent in the trial court. Otherwise, consent will be assumed. In addition, if this is a suit against the State, Illinois, by its voluntary participation in the AABD program, and by receiving federal funds therefor, on the condition that it furnish AABD assistance to the needy in compliance with the federal requirements under the AABD program, has constructively consented to suits in federal court to effectuate compliance with the federal requirements. In enacting the AABD program, Congress intended to have federal questions relating to the administration of the AABD program decided in federal court, and thus conditioned state participation in the AABD program on waiver of state immunity.

Finally, it is clear that the trial court, in the exercise of its traditional equitable powers, and acting pursuant to Section 1983, had the authority to require restitution of AABD benefits wrongfully denied. In this case, the Seventh Circuit did not err in upholding the restitution provisions of the lower court decree. They were necessary and appropriate to effectuate compliance with federal requirements under the Social Security Act, and to deter future violations thereof. In addition, there were no valid equities or reasons why members of the plaintiff class who were denied AABD benefits to which they were entitled, should not receive restitution of said benefits. Receipt of these benefits at this time furthers the paramount congressional interest of providing financial assistance to needy aged, blind, and disabled persons.

## ARGUMENT

### I.

### IN A SUIT AGAINST A STATE WELFARE DIRECTOR IN WHICH A FEDERAL COURT HAS UNDISPUTED JURISDICTION, THE ELEVENTH AMENDMENT DOES NOT STRIP THE COURT OF JURISDICTION TO GRANT COMPLETE EQUITABLE RELIEF, INCLUDING EQUITABLE RESTITUTION, TO REDRESS VIOLATIONS OF FEDERAL LAW.

At the outset, it must be emphasized that there is agreement between the parties that, notwithstanding the Eleventh Amendment, the federal court had jurisdiction of this suit against the Director of the Illinois Department of Public Aid under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The Director of the Illinois Department of Public Aid does not challenge on Eleventh Amendment grounds the lower court's power to enter a mandatory injunction ordering him, his predecessors and successors, to comply with the federal time standards for processing every future AABD application in the entire state of Illinois. Nor does he challenge on Eleventh Amendment grounds the federal trial court's power both to require him to pay AABD assistance effective the last day of the federal time period in all cases in which the processing of eligible applicants is delayed and to enjoin him from enforcing the state regulation inconsistent therewith. (Pet. Br. 14) This case, then, does not raise the question of whether this suit may be brought in federal court, as in *Employees of the Department of Public Health and Welfare v. Department of Public Health and*

*Welfare*, 411 U.S. 279 (1973).[10] This suit is properly in federal court; and the federal court is merely exercising its "traditional jurisdiction to hear and decide federal questions in this field." *Rosado v. Wyman*, 397 U.S. 397, 422 (1970).

Moreover, the Director in effect concedes that the members of the plaintiff class were wrongfully denied the AABD benefits in question unless the federal time regulations are invalidated. (See *infra* Part III.) However, the Director maintains that the plaintiffs may not recover in this suit, as an equitable adjunct to the injunction decree, the AABD benefits which they were wrongfully denied because the Eleventh Amendment to the United States Constitution deprives the federal court of the power to order a state official to make equitable restitution to even the named plaintiff, John Jordan, in the amount of $195.66 (App. 105), as well as the power to order equitable restitution to all of the other members of the class.

What is at issue in this case, then, is whether the federal court is barred by the Eleventh Amendment from granting the relief of equitable restitution, even if warranted, as an incident to other equitable relief against

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[10]In *Employees, supra*, the suit was filed directly against state departments for double damages and attorneys fees for alleged violations of The Fair Labor Standards Act. In contrast to this case, it was accepted that the suit in its entirety was against the State and barred from federal court by the Eleventh Amendment (unless there was a waiver by Missouri of its immunity from suit in federal court which the court held did not exist). Here, the opposite is true. It is accepted that, under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), this suit in the main is not against the State and not barred by the Eleventh Amendment, and accordingly it is not disputed that this suit against the Director is properly in federal court.

the Director of the Department of Public Aid, which, it is agreed, is not barred by the Eleventh Amendment. Respondent AABD recipients submit that this Court has rejected this contention repeatedly, albeit *sub silentio*, that this entire suit falls within the established doctrine of *Ex Parte Young*, and that the language of the Amendment itself precludes petitioner's interpretation. Moreover, at no time since the adoption of the Eleventh Amendment in the eighteenth century has this Court ever interpreted the Amendment as depriving a federal court of the power to grant full and complete equitable relief, once its jurisdiction over a suit was established.

### A. This Court Has Affirmed, in the Face of Eleventh Amendment Defenses, Numerous Judgments Ordering State Officials To Make Equitable Restitution of Public Assistance Benefits Wrongfully Withheld From Public Aid Recipients.

This Court has consistently affirmed judgments requiring state directors of public aid to make equitable restitution of public assistance benefits wrongfully denied, notwithstanding Eleventh Amendment defenses by the state officers. In *State Dept. of Health and Rehabilitative Services v. Zarate*, 407 U.S. 918 (1972), *aff'g* 347 F. Supp. 1004 (S.D. Fla. 1971), this Court affirmed the decision of a three-judge court requiring, *inter alia*, restitution of public assistance benefits to aliens who had been illegally denied assistance because they were non-citizens and did not meet Florida residence requirements. The defendants, State Department of Health, and the Secretary of the State Department of Health, appealed only from that portion of the order requiring restitution of public assistance benefits wrongfully denied. The sole question presented upon the appeal was:

> Does Eleventh Amendment bar lawsuit brought by citizens or non-citizens, resulting in judgment against state officers for retroactive welfare assistance benefits or payments? 40 U.S.L.W. 3572 (May 30, 1972)

This Court answered the question in the negative by affirming summarily.

In *Sterrett v. Mothers and Children's Rights Organization*, 409 U.S. 809 (1972), *aff'g* unreported order and judgment (N.D. Ind. 1972), on remand from *Carpenter v. Sterrett*, 405 U.S. 971 (1971), this Court again summarily affirmed a judgment ordering restitution of public assistance benefits wrongfully withheld. In *Sterrett*, a three-judge district court in Indiana ruled that the denial of AFDC benefits to eligible needy children between the ages of 16 and 18 solely because they were not regularly attending school violated the Social Security Act. Retroactive benefits (restitution) to cover previously denied payments were directed by the court. (CCH Pov. Law Rptr., Vol. 2, par. 15,384) On appeal to this Court by the defendant State Commissioner, one of two questions presented was as follows:

> Is federal court precluded by Eleventh Amendment from ordering state agency to pay money from state treasury and from ordering state agency to perform specified acts which would otherwise be in discretion of agency? 41 U.S.L.W. 3126.

This Court again answered the question in the negative by summarily affirming.

Similarly, in *Gaddis v. Wyman*, 304 F. Supp. 717 (S.D. N.Y. 1968) (order at par. 10,506, Transfer Binder, CCH Pov. Law Rptr.), *aff'd per curiam sub nom. Wyman v. Bowens*, 397 U.S. 49 (1969), restitution was required for the class of persons wrongfully denied public assistance

benefits. The state public aid officials argued unsuccessfully to this Court that the granting of retroactive welfare benefits was "an incursion on the Eleventh Amendment." Brief for Appellants, at p. 18. And in *Shapiro v. Thompson*, 270 F. Supp. 331, 338 n.5 (D. Conn. 1967), *aff'd*, 394 U.S. 168 (1969), this Court affirmed, without reference to the Eleventh Amendment, the decision of the lower court which, in ordering restitution of benefits wrongfully denied, expressly rejected an Eleventh Amendment defense, relying primarily on *Ex Parte Young*, 209 U.S. 123 (1908).

In addition, this Court has summarily affirmed other opinions and judgments which, without any discussion of the Eleventh Amendment, ordered state welfare directors to make equitable restitution to public assistance recipients of benefits wrongfully withheld.[11] *Rodriguez v. Swank*, 403 U.S. 901 (1971), *aff'g* 318 F. Supp. 289 (N.D. Ill. 1970) (order at App. 22-29); *Doe v. Weaver*, 404 U.S. 987 (1971), *aff'g* 332 F. Supp. 61 (N.D. Ill. 1970); *Grubb v. Sterrett*, 400 U.S. 922 (1971) *aff'g* 315 F. Supp. 990 (N.D. Ind. 1970). In *Graham v. Richardson*,

[11]In addition to the cases affirmed by this Court, there is a formidable body of federal decisions throughout the country which, without mentioning the Eleventh Amendment, have ordered state officials to make restitution to public aid recipients of benefits wrongfully denied. *McDonald v. Dept. of Public Welfare*, 430 F.2d 1268 (5th Cir. 1970); *Wilson v. Weaver*, 358 F.Supp. 1147, 1152 (N.D. Ill. 1973); *Alexander v. Weaver*, 345 F.Supp. 666 (N.D. Ill. 1972); *Schaak v. Schmidt*, 344 F.Supp. 99, 104 (E.D. Wis. 1971); *Alvarado v. Schmidt*, 317 F.Supp. 1027 (W.D. Wis. 1970); *Stoddard v. Fisher*, 330 F.Supp. 566 (D. Me. 1971); *Tripplett v. Cobb*, 331 F.Supp. 652 (N.D. Miss. 1971); *Baxter v. Birkins*, 331 F.Supp. 222, 226 (D. Colo. 1970); *Ojeda v. Hackney*, 319 F.Supp. 149 (N.D. Tex. 1970); *Brooks v. Yeatman*, 311 F.Supp. 364 (M.D. Tenn. 1970); *Machado v. Hackney*, 299 F.Supp. 644 (W.D. Tex. 1969). In *Lewis v. Riggins* (N.D. Ind. 1971, 71 H 19) (attached to Plaintiffs' Reply Brief, Item 56), the court required restitution of public assistance benefits wrongfully denied in circumstances almost identical to this case.

403 U.S. 365, 367-68 (1971), involving the unconstitutional denial of welfare benefits to aliens, this Court referred to the plaintiffs' complaints as seeking "the award of amounts allegedly due," and, "the ordering of back payments wrongfully withheld," and, without discussion of such relief, affirmed. As stated in *Gaither v. Sterrett*, 346 F. Supp. 1095, 1099 (N.D. Ind. 1972), *aff'd*, 93 S.Ct. 688 (1973):

> "[T]his court would note that if defendant's position regarding the jurisdictional bar of the Eleventh Amendment is correct, a great number of federal district court judgments are void and the Supreme Court has affirmed many of these void judgments."

In sum, then, while the respondent welfare recipients maintain that the Supreme Court decisions described above reject the Eleventh Amendment defense, a statement of the reasons underlying rejection of the Eleventh Amendment as a bar to equitable restitution in these public assistance cases awaits formulation. The Seventh Circuit reasoned that the Eleventh Amendment was not a bar to such relief based on the long-established doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). *Jordan v. Weaver*, 472 F.2d at 990-94.[12]

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[12]Petitioner relies on *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), which concludes that the Eleventh Amendment bars equitable restitution. It should be noted that the reasoning of *Rothstein*, with respect to the Eleventh Amendment bar, has been repudiated in *Story v. Roberts*, 352 F. Supp. 473 (M.D. Fla. 1972) (prior to the Seventh Circuit opinion in *Jordan*); *Silvey v. Roberts*, ___,F. Supp.___ (M.D. Fla., Aug. 3, 1973) and in *Frey v. Lukehard*, 361 F. Supp. 60 (W.D. Va. 1973). In the latter two cases, the courts expressed agreement with the reasoning of the Seventh Circuit in the instant case.

### B. Under the Doctrine of *Ex Parte Young*, a State Official Acting on Contravention of Paramount Federal Law Is Stripped of His Official or Representative Capacity and Is Not Protected by Eleventh Amendment State Immunity.

In this case the Director of the Illinois Department of Public Aid acknowledges that under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), the federal court here is neither stripped of judicial power by the Eleventh Amendment "from ordering state officials to bring their conduct into conformity with federal law," nor from entering a "mandatory injunction" against a state official. (Pet. Br. at 14) But at the point where the federal court grants restitution of AABD benefits wrongfully denied to the parties actually injured by the actions of the Director of the Illinois Department of Public Aid, the petitioner seeks to raise the shield of the Eleventh Amendment as a barrier. The Eleventh Amendment, however, relates to the immunity of States. Thus, the Director must be claiming that when he violated federal law, he was acting under the authority of the state. But it has been settled law since *Ex Parte Young*, 209 U.S. 123 (1908), that when a state official violates paramount federal law, his act is

> "without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official . . . and he is in that case stripped of his official or representative character . . . The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.* at 159-160.

In *Ex Parte Young, supra,* the plaintiffs sought to enjoin the Attorney General of the State of Minnesota

and the members of the state warehouse and railroad commission, from enforcing state legislation setting allegedly confiscatory railroad rates, and further sought to enjoin the railroad company from adopting the prescribed rates. In addition, the plaintiffs challenged the provisions of the legislation establishing enormous penalties, both monetary fines and criminal sanctions, for violations of the prescribed rates. *Ab initio*, the Attorney General argued that the court had no jurisdiction over him because the suit was in effect against the state, and was therefore barred by the Eleventh Amendment. Notwithstanding this defense, the federal court entered a preliminary injunction enjoining the Attorney General from enforcing the challenged legislation in the state courts. The Attorney General, in violation of this order, filed a mandamus petition in state court to enforce the legislation. In response to a rule to show cause why he should not be held in contempt of court, the defendant again pleaded the Eleventh Amendment defense. The court found him in contempt, imposed a fine, and ordered him to dismiss the mandamus proceedings brought by him in the name of the state.

In its landmark decision, the Court upheld the jurisdiction of the federal court in the suit against the state official notwithstanding the Eleventh Amendment. Based on the reasoning quoted above, the Court established the principle that state officers, acting in violation of paramount federal law, could not claim the protective shield of the Eleventh Amendment. State immunity under the Eleventh Amendment could not be imparted to a state official so as to give him "immunity from responsibility to the supreme authority of the United States." (*Id.* at 160)

In the instant case, the Director of the state welfare department raises the Eleventh Amendment defense in

almost identical circumstances to that of the Attorney General of Minnesota. Both were acting in violation of federal law; both also knew that their actions were contrary to federal law but persisted in their illegality. In *Young*, the federal court had undisputed jurisdiction over some of the parties and further exercised jurisdiction over Young to be able to grant full and appropriate relief. Similarly, in this case, the Director of Public Aid concedes that the federal court has jurisdiction over the suit, but argues that the Eleventh Amendment bars equitable restitution, the only relief that redresses the injury to the members of the plaintiff class harmed by the defendant's actions. Just as the state officer in *Young* could not claim Eleventh Amendment immunity from suit in federal court, the Director of the Illinois Department of Public Aid may not claim such immunity to shield his illegal actions and to bar relief to redress the deprivation of federal rights.

As stated in *Sterling v. Constantin*, 287 U.S. 378, 393 (1932), state officials purporting to act under state authority who invade rights secured by paramount federal law, "are subject to the process of the federal courts in order that the persons injured may have appropriate relief." In that case, the Governor had acted to nullify an interlocutory order of the court whereas in this case the Director of Public Aid had acted to nullify the order of the three-judge court in *Rodriguez* and the federal law relating to processing of applications of needy aged, blind, and disabled persons. In both cases, the responsibility of the state officers was "to aid in making its [the federal court's] process effective and not to nullify it; to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared." *Sterling v. Constantin*, 287 U.S. 378, 404 (1932).

Under the circumstances of this case, there is no basis for allowing the State of Illinois to impart to the Director of the Department of Public Aid "any immunity from responsibility to the supreme authority of the United States." (*Ex Parte Young, supra* at 159-160) or allowing the Director to claim state immunity. Immunity from suit is a high attribute of sovereignty and must not be held to provide a shield for illegal acts of public agents. Petitioner cites no case law or historical support for the proposition that the Eleventh Amendment was intended to bar relief for injuries incurred as a result of the individual illegal acts, whether deliberate or otherwise, of state officers, such as in the instant case. *Compare Hans v. Louisiana*, 134 U.S. 1 (1890).

Moreover, *Ex Parte Young* establishes that a state officer, acting in violation of paramount federal law, is "stripped of his official or representative character," (*Id.* at 160), and, accordingly, suits against state officers under these circumstances are not suits against the state. See generally, Davis, *Suing The Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435 (1962). This principle underlies the conclusion that this suit against the Director of the Department of Public Aid is not against the State of Illinois within the meaning of the Eleventh Amendment.[13] If the provisions of the judgment ordering the Director of Public Aid to process all AABD applications in Illinois in the future in compliance with federal law and ordering him to pay AABD effective at the very latest as of the last day of the maximum time period for all future eligible applicants in Illinois, do not amount to relief against the State of

[13]See *La. State Bd. of Education v. Baker*, 339 F.2d 911 (5th Cir. 1964).

Illinois, as is conceded, this logic must also embrace the provisions of the judgment ordering the Director to make equitable restitution of AABD benefits wrongfully withheld. In all instances the Director is "stripped of his official or representative character," particularly, where the established facts are, as here, that the Director was fully aware of the violations of federal law.

Significantly, the rationale of *Ex Parte Young* that a state officer, when acting in violation of the law, is not acting on behalf of the sovereign, and therefore may not claim state immunity from suit, is wholly consistent with Illinois law. It is settled under Illinois law that suits against state officials acting in violation of law are not suits against the State. *County of Cook v. Ogilvie*, 50 Ill.2d 379, 280 N.E.2d 224 (1972); *Rodriguez v. Swank*, 318 F. Supp. 289, 296 (N.D. Ill. 1970), *aff'd*, 403 U.S. 901 (1971). Thus under Illinois law this suit would not be considered against the State and, therefore, the Eleventh Amendment issue, based on state law, is not joined.[14] *Aerojet General Corp. v. Askew*, 453 F.2d 819 (5th Cir. 1971), *pet. for rehearing denied*, 453 F.2d 836 (1972).

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[14]The reasoning in *Chicago Welfare Rights Organ. v. Weaver*, 5 Ill. App. 3d 655, 284 N.E.2d 20 (1972), relied on by petitioner (Pet. Br. 34-36) has recently been rejected by the Illinois Supreme Court, ___ Ill.2d ___ (Sept. 25, 1973). In its decision, the Illinois Supreme Court held that 1983 actions by welfare recipients, such as the instant one, may not be brought in state court, except pursuant to the Illinois Administrative Review Act, ch. 110, §264 *et seq.*, and, on this ground, affirmed the judgment of the appellate court dismissing the action. This decision, it appears, denies a class of welfare recipients, such as in this case, a remedy of equitable restitution in Illinois courts, since it is not possible to proceed as a class under the Illinois Administrative Review Act.

### C. The Eleventh Amendment Has Never Been Interpreted by This Court as Restricting the Judicial Power of a Federal Court With Respect to the Granting of Appropriate Equitable Relief in a Suit Over Which It Has Undisputed Jurisdiction.

The proposition urged by the petitioner, i.e., that the Eleventh Amendment deprives the federal court here of the judicial power to grant full and complete equitable relief to the plaintiffs, is wholly inconsistent with the language of the Amendment,[15] is unsupported by any holding of this Court, and represents a radical departure from previous Eleventh Amendment cases. First, the language of the Amendment itself states that the judicial power of the federal courts "shall not be construed to extend to any suit" against "one of the United States." The Director of Public Aid, however, concedes that under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), the plaintiffs may bring this "suit" against him in federal court to enjoin the enforcement of illegal state regulations, and to require him to comply with federal time requirements in processing AABD applications. (Pet. Br.

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[15]The Eleventh Amendment provides:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State."

The Eleventh Amendment was adopted in response to the decision of the Court in *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1973) and in effect, reversed this holding. *See generally*, Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972). Petitioner here relies exclusively on Eleventh Amendment immunity from suit in federal court, and does not argue that the relief in question is barred by the common law doctrine of sovereign immunity.

14) Thus, the Eleventh Amendment is not a bar to the "suit" in federal court against the Director, but, it is argued, is a bar to the incidental equitable relief of equitable restitution. But the literal language of the Eleventh Amendment in no way constricts the breadth of equitable relief which might be granted by a federal court. Once the threshold jurisdictional question is overcome, and the suit against a state officer is within the jurisdiction of the federal court and not barred by the Eleventh Amendment, as it is in this case, then the Eleventh Amendment has no relevancy to the question of proper relief. Instead, the Eleventh Amendment, and cases interpreting it, relate to the issue of whether a "suit," as a whole, against a state officer or state agency may be heard in federal court. *E.g., Griffin v. School Board of Prince Edward County*, 377 U.S. 218, 228 (1964); *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Ex Parte Young*, 209 U.S. 123 (1908). The contention that the Eleventh Amendment may restrict the equitable powers of the federal court is a radical notion, never before acknowledged by this Court.[16]

To the contrary, once jurisdiction over the state officer is secured, this Court has made clear that the federal courts may exercise the full scope of their equitable powers to fashion appropriate equitable relief. In *Griffin v. School Board of Prince Edward County*, 377 U.S. 218

[16]Reliance by petitioner (Pet. Br. at 37) on *Louisiana v. Jumel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886); and *North Carolina v. Temple*, 134 U.S. 22 (1890), is misplaced because the issue presented in those cases was whether the "suit" could be heard in federal court. Even on that point, the reasoning and holdings in those cases are in effect repudiated by the doctrine announced in *Ex Parte Young*, 209 U.S. 123 (1908).

(1964), the plaintiffs claimed that the closing of the public schools in Prince Edward County while maintaining public schools in all the other counties of Virginia, denied the petitioners and the class they represented the equal protection of the laws guaranteed by the Fourteenth Amendment. While recognizing that "actions of the State are involved," the Court rejected the argument by the state officials that the suit was against the State within the meaning of the Eleventh Amendment. *Id.* at 228. Having disposed of the threshold jurisdictional issue, and then deciding in favor of the plaintiffs on the substantive issue, the Court proceeded to elaborate on the power of the federal court to fashion a "decree necessary and appropriate to put an end to racial discrimination." Not only were prohibitory injunctions appropriate, but also "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County . . ." (*Id.* at 233) and also the Discrict Court could, if appropriate, enter an order requiring the reopening of the public schools.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), a suit against the Governor of Texas and other state officials to enjoin limitations placed on the production of oil from plaintiff's wells, the Court first resolved the threshold jurisdictional issue involving the Eleventh Amendment in favor of the plaintiff. *Id.* at 393. Once jurisdiction was established, the Court rejected the defendant's contention that an injunction was improper and emphasized that the federal court had the power to grant appropriate equitable relief.

> "The suggestion confuses the question of judicial power with that of judicial remedy. If the matter is

one of judicial cognizance, it is because of an alleged invasion of a right, and the judicial power necessarily extends to the granting of the relief found to be appropriate according to the circumstances of the case." 287 U.S. at 403.

See *Ex Parte Young*, 209 U.S. 123, 166 (1908)

Similarly, the Eleventh Amendment has never been a bar to the fashioning of appropriate equitable relief against state officers in reapportionment cases. *E.g., Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala. 1972) (supplemented in 340 F. Supp. 691), *aff'd* 93 S.Ct. 290 (1972); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Indeed, there is no decision by this Court in which the Eleventh Amendment has been interpreted as a bar to the federal court's power to grant complete and appropriate equitable relief. The function of the Eleventh Amendment is to bar certain kinds of suits from being heard in the federal courts. But if the suit against the particular defendant may be heard and decided in federal court under the doctrine of *Ex Parte Young*, the question of appropriate relief is separate and distinct from the bar of the Eleventh Amendment. The relief of equitable restitution, incident to the primary issue of the legality of the defendant's practices and regulations (*Rodriguez v. Swank*, 318 F. Supp. 289, 295 (N.D. Ill. 1970), *aff'd* 403 U.S. 901 (1971); *Samuel v. Univ. of Pittsburgh*, 56 F.R.D. 435, 440 (W.D. Pa. 1972)) does not independently trigger the Eleventh Amendment bar. Otherwise, a federal court will be unable to give "complete rather than truncated justice." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (see *infra* at 53-54)

Any attempt to draw distinctions between the prospective relief and the equitable restitution relief in terms of the applicability of the Eleventh Amendment leads to

an untenable interpretation of that Amendment.[17] The consequence of petitioner's position (Pet. Br. 31) would be that under the Eleventh Amendment the judicial power of the federal court does extend to prospective relief enjoining state officials from violating the federal rights of persons not before the court (future AABD applicants), but the judicial power does not extend to equitable relief against public officials to redress the deprivations of the federal rights of plaintiffs before the court, such as John Jordan. In addition, petitioner's position would mean that while federal courts may invalidate state legislation and enjoin state officials from enforcing such legislation, as is commonplace, without running afoul of the Eleventh Amendment immunity of states, federal courts may not require state officials to make restitution incident to the enjoining of illegal state regulations because of the Eleventh Amendment. To suggest that the former is not a suit against the state but the latter is, is capricious and illogical. As long as *Ex Parte Young* remains the law—and it has been described

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[17]Petitioner attempts to place Eleventh Amendment significance on the fact that with respect to the prospective relief, Illinois has the option to consent to it, but it does not have such option with respect to retrospective relief. (Pet. Br. 31) However, consent is relevant only if the Eleventh Amendment applies to a suit. (See Part II *infra.*) The threshold question is whether the Eleventh Amendment is even applicable, or whether the state official may claim Eleventh Amendment immunity under the particular circumstances. Retrospective relief, of course, is necessary to redress past wrong. For example, in *Vlandis v. Kline*, 409 U.S. 1036 (1973), *aff'g* 346 F.Supp. 526 (D. Conn. 1972), after finding unconstitutional the state statute defining nonresidents for purposes of charging higher tuition at the state university, the Court upheld a refund to the plaintiffs of the excess tuition that they paid but should not have.

as "indispensable to the establishment of constitutional government and the rule of law," C. Wright, *Handbook of the Law of Federal Courts* 186 (2d ed. 1970)—the doctrine must permit federal courts in suits against state officers to grant full and complete equitable relief under the circumstances of each case.[18]

### D. Equitable Relief Which Has an Impact on the State Treasury Is Not Barred by the Eleventh Amendment.

Relying on three cases involving state taxes (*Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944), the state welfare director asserts that any suit seeking a monetary award from the treasury of a local body politic is a suit against the State barred by the Eleventh Amendment. (Pet. Br. 29) These cases, however, do not establish any such principle, nor are they relevant to the issues presented in this case.

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[18]If *Ex Parte Young* is held not to govern this suit, then, this Court must face the question of whether the Fourteenth Amendment to the United States Constitution, with special reference to Section 5, implicitly overrides the Eleventh Amendment to the extent that it authorizes Congress to enact laws to enforce the Fourteenth Amendment. Respondents maintain that this Amendment supersedes the Eleventh Amendment bar to the extent that it authorizes Congress to establish federal court jurisdiction of suits against state officers to redress the deprivation of federal rights, to-wit: 42 U.S.C. §1343(3) and 1983. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n.7, 548 n.15, and 549 n.16 (1972); *Mitchum v. Foster*, 407 U.S. 225, 240 n.30 (1972); *Monroe v. Pape*, 365 U.S. 167 (1961); *Prout v. Starr*, 188 U.S. 537, 543 (1903). This suit, brought pursuant to Section 1983, falls within this ambit. (See *infra* IV.B.)

All three of these opinions, written by Justice Reed, involve suits by nonresidents pursuant to state-created causes of action for refund of state taxes. It was not conceded in any case that the case was properly in federal court as here; to the contrary, the question was precisely whether the suit could be brought in federal court in the face of the Eleventh Amendment. The Court never reached the question whether the tax assessments were in violation of federal law, in contradistinction to the substantive ruling in this case finding a violation of federal law. Moreover, the *Ex Parte Young* question of whether a state official could claim the shield of state immunity was not posed in any of the tax cases. Instead, the Court merely reviewed the state statutes sued under and concluded that the suits were against the respective states and that the state statutes did not establish consent to suit in federal court. Certainly there is nothing in the ratio decidendi of these cases to support the sweeping proposition announced in *Rothstein v. Wyman*, 467 F.2d at 236, and urged by the petitioner, that equitable relief against state officials which has a monetary impact upon the State is barred by the Eleventh Amendment. At most, these state tax cases reflect the unique considerations that surround federal judicial interference with enforcement of state tax law and the underlying policy of the federal courts not to decide these cases where an adequate remedy is otherwise available.[19] See *Lynch v.*

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[19] "The advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds is illustrative by the instant case where petitioner sued in a federal court for a refund only to urge on certiorari that the federal court erred in its interpretation of the state law . . . ." *Ford Motor Co. v. Treasury Dept.*, 323 U.S. at 470.

No such state issues are present in welfare cases such as this one.

*Household Finance Corp.*, 405 U.S. 538, 542 n.6 (1972); *Perez v. Ledesma*, 401 U.S. 82, 126 (1971) (concurring opinion of Justice Brennan).

Petitioner's reliance (Pet. Br. 30) on the dicta in *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1944) is misplaced. The Court in deciding when "the State is the real, substantive party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants," was examining the state law provisions under which plaintiffs sued for a tax refund to answer the threshold question whether the suit was against the State. Based on the state tax provisions, the Court concluded that the suit was against the state, whereas, in this case, both under Illinois law and under the doctrine of *Ex Parte Young*, this suit is not against the State within the meaning of the Eleventh Amendment. Since the Court in *Ford Motor Co.* concluded that the case was barred, *ab initio*, from federal court, obviously, the Court never reached the question of whether, in cases where federal courts have jurisdiction over state officers, equitable relief which has an impact on the state treasury is barred by the Eleventh Amendment.

In reality, in almost all cases in federal court involving injunctive relief against state officials, the relief granted has a monetary impact on the state. Indeed, the portion of the equitable relief in this case which required strict compliance with the federal time standards "requires the expenditure of more monies than the seriously disputed part of the judgment requiring the payment of wrongfully withheld benefits." *Jordan v. Weaver*, 472 F.2d at 991. Yet, the petitioner concedes the former relief is not barred by the Eleventh Amendment. Moreover, petitioner does not attempt to refute the fact that this Court has repeatedly affirmed judgments in public assistance cases,

including the companion case of *Rodriguez v. Swank, supra,* which have imposed substantial liabilities on state treasuries. (Cases discussed in I.A., *supra.*)

Turning to other cases, equitable relief which has an impact upon the state treasury has been regularly granted against state officials. *E.g., Vlandis v. Kline*, 409 U.S. 1036 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Wesberry v. Sanders*, 376 U.S. 1 (1964). In *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 233 (1964), the Court stated that it would be proper for the lower court to order the reopening of public schools in the county, and, if necessary, to order the levying of taxes to maintain such schools.[20] In *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny, this Court has required reapportionment of various legislative bodies and new elections thereunder, all at a considerable cost to states.[21] Similarly, in *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970), *cert. denied*, 400 U.S. 833 (1970), the court

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[20]See *School Board of Charlottesville v. Allen*, 240 F.2d 59, 62-63 (4th Cir. 1956), *cert. denied* 353 U.S. 910 (1957).

[21]In *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala. 1972), the court not only ordered the Alabama state legislature reapportioned, but also levied costs and attorneys fees of a considerable amount against the state officers. Similarly, in *LaRaza Unida v. Volpe*, 57 F.R.D. 94, 101-02 (N.D. Cal. 1972), the court in imposing attorneys fees against a state officer concluded "that the state may no more immunize an individual from costs incident to an injunction than it may insulate him from the injunction itself."

approved the issuance of a mandatory injunction requiring the Governor to call an election which would cost the state $400,000.[22]

In the seminal case of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824), the Court, in the face of the Eleventh Amendment, specifically directed restitution by the State treasurer of funds collected as a result of an illegal tax on a federally chartered bank. In that case, the Court answered in the affirmative the question of "whether an injunction can be issued to restrain a person, who is a state officer, from performing any official act enjoined by statute; and whether a court of equity can decree restitution, if the act be performed." *Id.* at 838. This holding and the governing principle were summarized in *Perez v. Ledesma*, 401 U.S. 82, 105-6 (1971) (Brennan, J., concurring):

> "Though recognizing the sensitivity of granting injunctions in this context, the Court held that neither the Eleventh Amendment nor any principles of federalism prevented the lower courts from giving

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[22]In *Holt v. Sarver*, 442 F.2d 304, 306-7 (8th Cir. 1971), a case involving prison conditions, the court expressly rejected the Eleventh Amendment as a bar to the suit, and recognized "that the prison units here in controversy are state agencies and that the funds necessary to operate the institutions must come from state appropriations." In *Jones v. Wittenberg*, 330 F. Supp 707 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972), and in *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), mental health and jail officials were ordered to take extensive affirmative remedial steps, requiring the appropriation of funds, in order to redress the deprivation of federal rights. See also *Cook v. Davis*, 178 F.2d 595 (5th Cir. 1949), *cert. denied*, 340 U.S. 811 (1950).

> such relief where necessary to vindicate paramount federal law . . . [T]he basic principle that in appropriate circumstances federal courts will exercise their equity power against state officials to protect rights secured and activities authorized by paramount federal law remains firmly embedded in our jurisprudence."

In sum, the fact that an injunction has an impact on the state treasury is of no legal consequence whatsoever insofar as the applicability of the Eleventh Amendment.

The conclusion that the Eleventh Amendment does not bar a federal court from granting equitable restitution against a state officer does not mean that a federal court, in the exercise of its equity powers, should not take into account principles of equity, comity, and federalism. It is these restraints on equitable discretion (see Part IV *infra*), and not the Eleventh Amendment, which circumscribe a federal court's actions in suits over which there is undisputed jurisdiction under the doctrine of *Ex Parte Young*.

## II.

## ASSUMING, ARGUENDO, THAT THIS IS A SUIT AGAINST THE STATE, ILLINOIS HAS CONSENTED TO THIS SUIT IN FEDERAL COURT.

### A. Illinois Has Consented to This Suit in Federal Court by Its Actions in Defending the Suit and Its Failure To Raise the Absence of Consent and the Eleventh Amendment Defense in a Timely Manner Before the Trial Court.

At no time prior to the decision and judgment of the lower court did petitioner assert Eleventh Amendment immunity as a bar to equitable restitution. In his answer, the jurisdiction of the court was admitted. (App. 58,

para. 2 and 3) Only after an adverse decision on the merits and the entry of an order granting the relief prayed for in the complaint,[23] and the filing of the notice of appeal, did petitioner belatedly attempt to claim the protection of the Eleventh Amendment.

This contention comes too late. As the Eleventh Amendment provides "... an immunity which a state may waive at its pleasure (*Missouri v. Fiske*, 290 U.S. 18, 24) as by a general appearance in litigation in a federal court (*Clark v. Barnard*, 108 U.S. 436, 447-448))," *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 (1959), unless immunity is claimed initially, it must be assumed that consent is given to the jurisdiction of the court. Although this Court has not previously determined at what precise stage in the proceedings the claim of Eleventh Amendment immunity will be foreclosed due to failure to raise it in a timely manner, policies underlying the established rules of law on waiver of objections to personal jurisdiction and considerations particular to Eleventh Amendment immunity dictate a cut-off point prior to the initiation of the appellate process.

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[23]In seeking to excuse his failure to raise the Eleventh Amendment defense in the trial court, petitioner states: "Respondents never sought retroactive benefits in their prayers for relief ..." (Brief for petitioner, p. 13) Petitioner presumably overlooked paragraph 5 of the prayer for relief in the complaint (App. 14) and the amended complaint (App. 47) which ask that the court "Enter a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld." Moreover, the restitution issue was fully briefed by the plaintiffs prior to judgment. (R. Item 48) Finally, the Director was certainly aware of the judgment in *Rodriguez v. Swank* (App. 22-29) which had granted restitution to the class of AFDC recipients in Illinois.

1. *Eleventh Amendment Immunity is in the Nature of a Privilege of Personal Jurisdiction Which is Deemed Waived by the Failure to Raise it in a Timely Fashion.*

Immunity from suit under the Eleventh Amendment has been described as "a personal privilege which may be waived." *Missouri v. Fiske*, 290 U.S. 18 24 (1933). Indeed, it is the historical attribute of waivability which makes the protection of the Eleventh Amendment comparable to aspects of personal jurisdiction such as venue, rather than to restrictions on subject-matter jurisdiction.[24] As with other examples of personal privilege, Eleventh Amendment immunity should be raised in a timely manner or consent should be deemed to have been given to the jurisdiction of the court.

The rule in federal courts is that in order to preserve a defense based on personal privilege, the party claiming the privilege must raise the issue before the trial court moves to a consideration of the merits of the case. For example, an objection to venue is waived by failure of the party claiming the privilege to raise the issue by motion or answer in the trial court. *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924). This rule reflects the policy of preventing a party who has appeared and litigated on the merits from claiming the protection of the privilege at a later time to avoid the effect of an adverse determination.

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[24] Analyzing Eleventh Amendment immunity in this way avoids an apparent contradiction between the ability of a state to consent to suit and the basic concept of limited federal jurisdiction. Compare *Employees v. Department of Public Health and Welfare*, 411 U.S. 279 (1973), Opinions of Marshall, J., at 294-95, n.10 and Brennan, J., at 321-22.

Since the privilege is for the benefit of the litigant, it is deemed waived unless raised by motion or answer.[25]

Similarly, when the Eleventh Amendment privilege can be raised by a state, appearing without claiming the protection of the Amendment constitutes consent to suit. *Petty, supra; Clark v. Barnard*, 108 U.S. 436.

> "Although a state may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a state voluntarily becomes a party to a cause and submits its rights to judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Gunter v. Atlantic Coastline R.R. Co.*, 200 U.S. 273, 284 (1905)[26]

In the instant case, petitioner appeared, answered and defended to judgment. The claim of immunity, asserted only after the entry of an adverse decision and judgment by the trial court, must be held foreclosed. This was the conclusion in *Lidie v. State of California*, 478 F.2d 552, 556 (9th Cir. 1973), which refused to consider the state's claim of Eleventh Amendment immunity when raised for the first time on appeal. The Ninth Circuit held that the defendants waived whatever protection they may have

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[25]This approach is consonant with the general rule in state courts which holds that sovereign immunity is a matter of personal jurisdiction which can be waived. *E.g., City of Kenosha v. State*, 151 N.W.2d 36, 35 Wis.2d 317 (1967).

[26]Prior to the *Gunter* case, the Attorney General had unsuccessfully defended a suit brought by stockholders of a corporation to enjoin its taxation. (*Humphrey v. Pegues*, 834 U.S. (16 Wall.) 244 (1872). *Gunter* was considered ancillary to the first action and the state's claim of immunity, though raised at the outset of the second suit, was disallowed.

had by failure to raise the defense at an appropriate time in the trial court. And see *Great Northern Insurance Co. v. Read*, 322 U.S. 47, 64 (1943) (Frankfurter, J., dissenting).

2. *Unique Aspects of Eleventh Amendment Immunity Reinforce the General Rule on Waiver of Such a Privilege by Failure to Raise it in the Trial Court.*

Factors particular to Eleventh Amendment immunity necessitate that the party claiming its protection invoke it or be held to have waived it and consented to suit. Where a suit is against an individual official by name, as in the instant case, questions can arise as to whether the action is a suit against the state within the meaning of the Eleventh Amendment and whether any Eleventh Amendment protection can be claimed—or waived—by the named defendant. *E.g., Ex Parte Young*, 209 U.S. 123 (1908); *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299 (1952).

Petitioner cites *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459 (1945), in order to excuse on grounds of irrelevancy his failure to claim Eleventh Amendment protection in the trial court (Pet. Br. 14). In *Ford*, the state having been sued directly, the Court found that failure to raise the issue of immunity below would constitute waiver if the officers had the power to waive immunity for the state, but held as a matter of state statutory construction that they did not.[27] *Id.* at 467-469.

[27]Relying on *Ford*, petitioner asserts that as a matter of Illinois law an assistant attorney general cannot waive the state's immunity. (Pet. Br. 14-16) Whether this is a correct formulation of Illinois law is doubtful (see *Monroe v. Collins*, 66 N.E.2d 670, 393 Ill. 553 (1946), as is the wisdom of this position if its expression is indeed accurate.

In this case, however, the petitioner is a state official who, it is submitted, as a matter of state law (*County of Cook v. Ogilvie*, 40 Ill.2d 379, 280 N.E.2d 224 (1972)) and federal law (*Ex Parte Young*) cannot claim the immunity of the state if acting illegally. (See Section I.B., *supra*) Conversely, if petitioner is able to successfully claim any immunity, he must be doing so as the representative of the state in this litigation, in which case his reciprocal power to disclaim immunity should logically be implied. *Cf. Ford, supra.*

In addition, as with other personal privileges, merely claiming Eleventh Amendment protection in the regular procedure of the case need not conclude the issue. In the face of timely and properly presented claim of immunity, the court may nevertheless find constructive waiver. *E.g., Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959); *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964). (See *infra* II.B.) In the Eleventh Amendment area, the issue of constructive waiver is a matter of federal law, based on an examination in each situation of the intent of Congress to subject the state to suit and of the actions of the state which constitute its consent. *Parden, supra,* at 196.

Whatever their ultimate resolution, an inquiry into any of these crucial matters will only be initiated in the trial court if defendant attempts to claim state's immunity. If, as here, the defendant official does not raise any immunity privilege against suit by motion or answer, the plaintiffs and the trial court must assume that the action is not to be considered a suit against the state or, if it is being so considered, that the official is exercising his power to consent to suit on behalf of the state, or that the state concedes constructive consent.

Not to hold the issue of immunity foreclosed by defendant official's failure to raise it would be manifestly

unfair to plaintiffs who have been deprived of their opportunity to adequately meet it on the record. It would also hinder appellate review by failing to insure that complex issues which require detailed analysis of law, policy, and fact in that area of activity which is the subject of a particular suit receive first consideration by the lower courts. For these reasons, whether Eleventh Amendment immunity is jurisdictional or in the nature of a personal privilege, "it should be raised by answer or other pleading in the regular process of the case." *Illinois Central R.R. Co. v. Adams*, 180 U.S. 28, 38 (1901). Waiver never having been considered in this case prior to judgment due to defendant's failure to claim Eleventh Amendment immunity, either consent to the suit must be assumed or the Court should refuse to review this improperly preserved issue.

**B. Illinois Constructively Consented to Suit by Voluntarily Choosing To Participate in the Federal AABD Program and Receiving Federal Funds Thereunder.**

The Seventh Circuit concluded that Illinois had consented to this suit in federal court based on the constructive consent doctrine. *Jordan v. Weaver*, 472 F.2d at 994-996. The question presented is whether Illinois' voluntary decision to participate in the AABD program, to receive federal funds thereunder, and to abide by federal requirements, and the intent of Congress in enacting the AABD program, bring this case within the principles of *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964) and *Petty v. Tennessee-Missouri Comm'n.*, 359 U.S. 275 (1959), or those of *Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare*, 411 U.S. 279 (1973). These cases establish the

outer parameters of the constructive consent doctrine. In *Parden*, the Court concluded that "Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to each suit [in federal court] as was authorized by that act." 377 U.S. at 192. In *Petty v. Tennessee-Missouri Comm'n*, 359 U.S. 275 (1959), the Court concluded that the two states entered into a compact, approved by Congress, to build a bridge and operate ferries over a navigable river "under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have." *Id.* at 280. Respondent AABD recipients maintain that Illinois, by choosing to participate in the AABD program, and agreeing to comply with federal requirements, has accepted a scheme of cooperative federalism under conditions which make it clear that it has waived any immunity from suit it otherwise might have.[28]

In this case, the Social Security Act establishes a federal-state welfare program for aged, blind, and disabled persons, where the states opt to participate for the benefit of eligible persons on the express condition that the states administer the program in conformity with federal requirements. 42 U.S.C. §1381-1385. Illinois has submitted a state plan that commits it to conform to federal requirements and, in particular, to the heart of the AABD program, to provide AABD assistance to eligible recipients.[29] *King v. Smith*, 392 U.S. 309 (1968);

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[28]In Butz v. Carter (No. 73-546), the Solicitor General in his petition for certiorari, filed September 1973, at 14-17, presents similar arguments with respect to the waiver of immunity from suit in federal court by state participation in the Food Stamp Program.

[29]See *Chesapeake Bay Bridge and Tunnel Dist. v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968), where the court held that the state's petition for permission to occupy the navigable waters pursuant to an act of Congress constituted a relinquishment of sovereign immunity and any Eleventh Amendment protection.

*Townsend v. Swank*, 404 U.S. 282 (1971).

Given this congressional scheme exacting state compliance with federal requirements as the quid pro quo for federal matching funds, this Court has already concluded that Congress intended beneficiaries of the categorical programs to have a federal claim against the state for non-compliance with federal law. *Rosado v. Wyman*, 397 U.S. 397, 420-22 (1970). In that case, this Court recognized that there was "not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field," and refused "to assume that Congress had closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program."[30] This interpretation of congressional intent is tantamount to a finding that Congress conditioned the participation of a state in the categorical assistance program on the forfeiture of immunity from suit in a federal forum. If Congress did not intend the suit in *Rosado* to be barred from federal court, Congress similarly did not intend this suit, identical in nature, to be barred from federal court. Both suits challenged state welfare practices and regulations as contrary to the Social Security Act. The fact that in this suit, the plaintiffs seek equitable restitution in addition to the relief secured in *Rosado* obviously has no bearing

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[30]These conclusions in *Rosado* answer petitioner's suggestion (Pet. Br. 17) that Congress intended an exclusive procedure and remedy in the form of cut-off of federal funds for failure to conform with the requirements of the Social Security Act. Also, it must be noted that the federal regulations governing the federal welfare programs expressly provide for federal financial participation in court-ordered retroactive welfare payments. 45 C.F.R. 205.10(b)(2)(3).

on the intent of Congress with respect to the suability of the state in federal court. Irrespective of the relief sought, the intent of Congress remains constant. The right of public assistance recipients to receive their federal entitlements is the heart of the AABD program, and a participating state has been fully aware, and certainly after *Rosado*, that suits to secure these federal entitlements are within the "traditional jurisdiction" of federal courts. Combining the decision in *Rosado* and the intent of Congress in enacting the AABD program, with the state's voluntary decision to participate in the AABD program, there can be little doubt that the petitioner has waived any immunity from suit in federal court he might otherwise have.

This conclusion is not inconsistent with this Court's holding in *Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare*, 411 U.S. 279 (1973). In that case, employees of certain state schools and hospitals sued their employer for double damages and attorneys fees for alleged violations of the overtime requirements under the Fair Labor Standards Act. This Court concluded that Congress in enacting the 1966 amendments to the Fair Labor Standards Act, adding FLSA coverage of certain state school and hospital employees, did not condition the continued operation by the State of Missouri of such institutions on the forfeiture of Eleventh Amendment immunity from suit in federal court.

In reaching this conclusion, the Court noted that the congressional scheme of enforcement under the FLSA empowered the Secretary of Labor to enforce through litigation private rights under the FLSA and to obtain restitution of unpaid wages for employees. In contrast, under the Social Security Act, Congress provided no mechanism for public enforcement, through litigation, of

the private rights, including restitution of benefits wrongfully denied, of welfare recipients. Moreover, the Court emphasized that "[i]t is one thing, as in *Parden* to make a state employee whole; it is quite another to let him recover double against a state." *Id.* at 283. Unlike the plaintiffs in *Employees*, the AABD recipients here are merely seeking relief to make them "whole." Relief requiring adherence to federal requirements and the payment of AABD benefits which should have been originally expended is certainly the kind of relief Illinois would expect on the basis of its voluntary participation in the AABD program, and, after the decision in *Rosado*, all doubts should have been put to rest that such claims could be brought in federal court. In contrast with *Employees* where the state continued to run its own institutions, albeit subject to the FLSA, in this case the state has entered into an arrangement of cooperative federalism in which the state is not operating exclusively on its own but is actually expending federal funds. The dramatic differences between the mere federal regulation of the payment of wages to state employees, and the entirely different congressional scheme of federal-state relations imposed under the Social Security Act, and the voluntary participation of the States in the latter, provide the grounds for the finding of constructive consent in this case and not in *Employees*.

## III.

## THE TIME STANDARDS FOR PROCESSING AABD APPLICATIONS EMBODIED IN HEW REGULATIONS ARE NEITHER AN UNREASONABLE INTERPRETATION OF NOR INCONSISTENT WITH THE "REASONABLE PROMPTNESS" REQUIREMENT OF THE SOCIAL SECURITY ACT.

Before reviewing equitable considerations, it is first necessary to dispose of the contention of the Director of the Illinois Department of Public Aid that the time standards in the federal regulations for processing AABD applications are arbitrary and inconsistent with the Social Security Act, 42 U.S.C. §1382(a)(8) (1969 ed.). This argument was not even presented to the trial court, and in accordance with the well-established rule, is thereby waived. *E.g., Tyrrell v. District of Columbia*, 243 U.S. 1 (1917)

Even if this court were to reach the merits of this contention, the issue is easily dismissed. The Social Security Act, 42 U.S.C. §1382(a) provides:

> "A state plan for aid to the aged, blind, or disabled and medical assistance for the aged, must . . .
>
> * * *
>
> "(5) provide (A) such methods of administration . . . as are found by the secretary to be necessary for the proper and efficient operations of the plan,
>
> "(8) provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals,[31]

[31]This section, added in 1962, Pub. L. 87-543, 76 Stat. 198, combined the identical provisions originally enacted in the Social Security Act Amendments of 1950, in the separate programs for the aged, blind, and disabled. Pub. L. 81-734, 64 Stat. 548, 553, and 555-6. *Cf., Jefferson v. Hackney*, 406 U.S. 535, 545 (1972).

"(13) include reasonable standards, consistent with the objectives of this subchapter for determining eligibility for and the extent of aid or assistance under the plan."

Pursuant to these congressional mandates, the Secretary of HEW exercised his rule making power under 42 U.S.C. §1302, and issued mandatory federal time standard regulations. Department of Health, Education and Welfare, Handbook of Public Assistance Administration, Part IV, Sections 2200(b)(3) and 2300(b)(5);[32] 45 C.F.R. §206.10(a)(3).[33]

These regulations, as noted in the Memorandum for the United States as Amicus Curiae in *Rodriguez v. Swank*, 403 U.S. 901 (1971), were drawn "on the experience of more than 17 years in administering the statute, as well as the experience and comments of various states and recipients." (Mem. at 7). As early as 1951, when the "reasonable promptness" provision became effective, the federal agency issued a directive (State Letter 167) requiring each state to specify a concrete standard of "reasonable promptness" for all but exceptional cases; if the standard exceeded 30 days for

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[32]"2200. Requirements for State Plans.

A State Plan for . . . AABD . . . must provide that:

(b)(3) prompt action will be taken on each application, within reasonable established time standards (which, effective July 1, 1968 will not exceed 30 days in AFDC, OAA, and AB, and as to age and blind in AABD, and 60 days in APTD and as to disabled in AABD) . . . .

* * *

"2300.

(b)(5) To assure the right to apply (IV-2200(b)): applicants are informed of the agency's time standard for promptness in action on applications (See IV-2200(b)(3) which is specified in agency policy, and that it covers the time from the date of application to the date the applicants are determined eligible and receive their first assistance check or notice of denial of assistance, . . ." (R 13)

[33]These regulations were effective February 27, 1971, 36 Fed. Reg. 3864.

aid to the aged and blind, and 60 days for aid to the disabled, the state was required to justify it and in addition, to develop plans to reach the predetermined standard by correcting practices which contributed to delay. (HEW, Handbook of Public Assistance Administration, IV-A, Sec. 2331, item 1, attached hereto as Exhibit A). After seventeen years experience with this standard and approach, HEW issued the regulations in question, with the modification, based on state comments, of the time standard for disabled applicants extended from 30 days to 60 days. (R Item 13). These regulations then were obviously not based on precipitous action, but were a carefully considered promulgation.

Indeed, Illinois adopted its own, albeit somewhat deficient, 30 day standard for aged and blind applicants, Section 4004.1, Illinois Categorical Assistance Manual, Illinois Department of Public Aid. Still, the Director of the Illinois Department of Public Aid now argues that the federal time standards are arbitrary and inconsistent with the "reasonable promptness" requirement of the act.

This contention must be rejected here, as it was, in connection with the AFDC program, in *Rodriguez v. Swank*, 403 U.S. 901 (1971), *aff'g* 318 F. Supp. 289 (N.D. Ill. 1970), and in *Like v. Carter*, 448 F.2d 798 (8th Cir. 1971) *cert. denied*, 405 U.S. 1045 (1972); *Worrell v. Sterrett*, (para. 10,575, C.C.H. Pov. Law Rpts., transfer binder) (N.D. Ind. 1969); *Lewis v. Riggins* (N.D. Ind. 1971) (attached to Plaintiff's Reply Brief, Item 56).

Clearly, under 42 U.S.C. §1302 and 1382(a)(5)(8) and (13) HEW has broad rule-making powers to interpret and implement the reasonable promptness provisions of the Social Security Act. This authority is recognized in *Lewis v. Martin*, 397 U.S. 552, 558 (1970).[34] Accordingly, it is

[34]See *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 277, n.28 (1969).

entirely appropriate for the Secretary to make the reasonable promptness requirement in the statute more definite by rule. The provisions in question draw on experience of more than 17 years of administering the program. Illinois, in fact, adopted time standards within the federal time standards. There is no merit in the contention that the federal regulations are arbitrary. As stated in *Lewis v. Martin*, 397 U.S. 552, 558:

"We give HEW the deference due the agency charged with administration of the act . . ."

**A. The Defense of Prospective Application Only of District Court's Judgment Is Without Merit.**

Defendant welfare officials also maintain that the non-retroactivity doctrine enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), requires that the judgment below should be given only prospective application. (Pet. Br. at 37 incorporates by reference pp. 18-22 of the Petition for Certiorari on this point.) Because this question was not presented to the district court below prior to judgment, it is not properly before this Court. *Tyrrell v. District of Columbia*, 243 U.S. 1 (1917); *Jordan v. Weaver*, 472 F.2d at 995. Even if it were, the contention is wholly without merit.

In *Chevron* the plaintiff brought suit under the "Lands Act" (43 U.S.C. §1331 *et seq.*) to recover for personal injuries suffered while working on the defendant's artificial island drilling rig located on the Outer Continental Shelf off the Louisiana coast. At the time the lawsuit was filed, firm precedent interpreted the Act to make general admiralty law, including the equitable doctrine of laches, applicable. But before trial the Supreme Court decided *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), holding state law and not admiralty doctrines,

should be applied under the Lands Act. Relying on the new Supreme Court decision, the lower court held that the Louisiana one year statute of limitations governed, and not the admiralty law which would have permitted the action, and dismissed the case. The Supreme Court reversed. The Supreme Court held that the decision in *Rodrigue v. Aetna Casualty and Surety Co., supra,* establishing a new rule of law, should not be applied retroactively to a suit filed prior thereto, particularly in view of the fact that it would deprive plaintiff of any remedy.

Respondent welfare recipients submit that the *Chevron* doctrine is not applicable to this case. *See generally, Alexander v. Weaver,* 345 F. 666, 670-74 (N.D. Ill. 1972) vacated and remanded for entry of fresh judgment, 37 L.Ed.2d 141 (1973). The *Chevron* doctrine is applied to determine whether an earlier "decision [is] to be applied nonretroactively," 404 U.S. at 106. In this case there is no earlier decision, no counterpart to the *Rodrigue v. Aetna Casualty & Surety Co.*, case. Instead, the Director argues that the rule of the *Jordan* case, the instant case, "be applied nonretroactively" so as to deny to the plaintiffs before the court the relief to which the decision of their case establishes they are entitled. Defendant's attempted application of the *Chevron* doctrine to the facts of this case is wholly without merit.

Even if *Chevron* is considered applicable, defendant nevertheless fails to meet the three tests enunciated in the decision. The first test is:

> "The decision to be applied nonretroactively must establish a new principle of law either by overruling clear past precedent on which litigants may have relied, or by deciding an issue whose resolution was not clearly foreshadowed . . . ." 404 U.S. at 106.

In the instant case, no new rule of law was announced, as the Seventh Circuit recognized, 472 F.2d at 996; instead, the court merely enforced federal requirements which the defendant was well aware of. Cf., *United States v. Donnelly*, 397 U.S. 286 (1970). As to the second and third factors, whether the retrospective operation of the earlier decision will further the new rule, and will produce inequitable results, it is only by granting equitable restitution to the plaintiffs that purpose and effect will be given to the federal time standards, and that appropriate equitable relief will be given in this case.[35] (See Part IV *infra.*)

Defendant's argument is not advanced by reference to *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (referred to hereinafter as in the Petition, as Lemon II). Once again, the question presented was whether an earlier decision, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon* I), was to be applied nonretroactively. More specifically, in *Lemon* I the Court held that the Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. In the first case plaintiffs abandoned their attempt to enjoin contracts or the payment of state funds under the state statutory program for the first year, and similarly did not seek to enjoin contracts or payments for the second year or third year. Only after the decision in *Lemon* I, on remand, did

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[35] "Thus the 'purpose of the new rule' test is not really applicable here since there is no 'new' rule, only the revelation of an old one, and even if purpose was a consideration, that purpose would have to be assessed as of the time of its applicability absent the invalid regulation and not as of today." *Alexander v. Weaver*, 345 F. Supp. at 673 (N.D. Ill. 1972).

they seek to prevent the reimbursement by the state for services already provided by the schools under contracts for the third year, all of which services were provided prior to the decision in *Lemon* I. Under these circumstances, the Court affirmed the decision of the lower court which permitted Pennsylvania to reimburse the schools for services performed prior to *Lemon* I, but enjoined any payments under the program for services rendered after *Lemon* I. *Lemon* II, 411 U.S. 192 (1973).

Unlike *Lemon* II, in this case the plaintiffs, *ab initio*, have sought the challenged relief in *Jordan* I; there is no *Jordan* II. Moreover, the defendants in this case knew that "substantial numbers of eligible AABD applicants were being deprived, contrary to the requirements of federal law, of their full AABD entitlements effective thirty days from the date of their application . . . ." (App. 87)

## IV.

### GRANTING EQUITABLE RESTITUTION TO MEMBERS OF THE PLAINTIFF CLASS WAS WITHIN THE EQUITABLE POWERS OF THE COURT.

In the trial court the Director of Public Aid argued that restitution of benefits wrongfully denied should not have been granted "back any further than the date this lawsuit was filed." (App. 107) This contention was abandoned in the court of appeals and also, necessarily, in this Court. Instead, the Director of Public Aid, while in effect conceding that all members of the plaintiff class were unlawfully denied AABD benefits to which they were entitled, now contends that no restitution whatsoever is proper (a) because of the Eleventh Amendment, (b) because of the nonretroactivity doctrine enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and (c)

because neither the Social Security Act nor 42 U.S.C. §1983 authorizes restitution of benefits wrongfully denied. In this part, respondent AABD recipients will review the bases for the Court's authority under the Social Security Act and under 42 U.S.C. §1983 to grant restitution, and the reasons why equitable restitution furthers the congressional purposes embodied in the Social Security Act and is a proper remedy to effectuate compliance with the Act.

### A. The Trial Court in the Exercise of Its Traditional Equitable Powers and in Furtherance of the Purposes of the Social Security Act Had the Authority To Require Restitution of AABD Benefits Wrongfully Denied.

Petitioner claims that "there is no language, express or implied, in the Social Security Act which grants welfare recipients the right to retroactive benefits." (Pet. Br. 17) This contention reveals a misunderstanding of the court's power as a court of equity to fashion appropriate remedies to further the purposes of the Social Security Act. The issue is not whether there is "a right to retroactive assistance" (Pet. Br. 24), whatever the word "retroactive" means in that context. There is an unquestioned right to benefits. In *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970), the Court stated: "Such benefits are a matter of statutory entitlement for persons qualified to receive them." And this Court has repeatedly recognized that "the existence of a statutory right implies the existence of all necessary and appropriate remedies," *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239 (1969), and that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purposes," *J.I. Case v. Borak*, 377 U.S. 426, 433 (1963). As recently stated:

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenberg Bd. of Education*, 402 U.S. 1, 15 (1971).

Thus the question is whether the maxim *ubi jus ibi remedium* will be fulfilled.

Respondent AABD recipients maintain that it was not unreasonable for the lower court, exercising its traditional equitable powers, to conclude that a restitution order was appropriate and necessary to enforce compliance with the Social Security Act, to give effect to its purposes, and to provide a remedy for the violation of law. *Porter v. Warner Holding Co.*, 328 U.S. 295 (1946); *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960).

*Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), concerned the equitable power of a federal court to order restitution of rents collected by a landlord in excess of the maximums permissible under the Emergency Price Control Act. The courts below had held that there was no authority under the statute to order restitution. In reversing, the Court enunciated the principles supportive of the lower court decisions in this case.

"Unless otherwise provided by statute, all the inherent equitable powers of the District Courts are available for the proper and complete exercise of that jurisdiction. . . . Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing

complete justice, should not be yielded to light inferences, or doubtful construction.' " *Id.* at 398.

Recognizing, then, the authority of a federal court to grant equitable restitution, the Court examined the function of a restitution order in the context of the purposes of the Emergency Price Control Act. For reasons wholly applicable to the instant case, the Court upheld a restitution order on two theories:

"(1) It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief . . . [W]here as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief . . ."

"(2) It may be considered as an order appropriate and necessary to enforce compliance with the Act . . . . The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.* at 399-400 (citations omitted).

In *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960), this Court made clear that the *Porter* decision did not

stand for the proposition that the authority to grant equitable restitution rested on an express or implied congressional enactment, the very proposition offered here by the petitioner. In *Mitchell* the Court was confronted with the question whether the federal court had the authority to order restitution of lost wages to an employee discharged in violation of the Fair Labor Standards Act. Relying on the principles announced in *Porter v. Warner Holding Co., supra,* the Court reiterated the basic tenet that a court of equity has the power to provde "complete relief in light of the statutory purposes." *Mitchell v. DeMario Jewelry,* 361 U.S. at 291-92. Analyzing, then, the purposes of the Act and the provisions of the Act barring retaliation against employees reporting violations thereof, this Court concluded again, as in *Porter*, that equitable restitution was consistent with the purposes of the Act and indeed that there was "doubtless little room for the exercise of discretion not to order reimbursement . . ." *Id.* at 296.

The authority of the federal court here to grant equitable restitution of AABD benefits unlawfully denied is squarely within the principles established in *Porter* and *Mitchell.* There are no provisions in Title XVI of the Social Security Act, 42 U.S.C. §1381 *et seq.* (1969 ed.) which in any way restrict the federal court's traditional comprehensive equity powers to give "complete rather than truncated justice." *Porter, supra,* 328 U.S. at 398. In the absence of any such statutory restriction on the court's equitable powers, "the full scope of that jurisdiction is to be recognized and applied." *Id.*

In *Rosado v. Wyman,* 397 U.S. 397 (1970), a case involving the AFDC program, this Court has already rejected the argument (Pet. Br. 17) that the grant of authority under the Social Security Act to HEW to cut off federal funds for noncompliance with statutory

requirements provides the exclusive procedure and remedy for violations of the Act. *Rosado v. Wyman*, 397 U.S. at 405-407, 420-423. While the issue was decided there in the context of New York's argument that primary jurisdiction existed in the Department of Health, Education and Welfare over challenges to state welfare provisions as violative of the provisions of the Social Security Act, the Court's reasoning fully supports the federal court's authority to grant equitable restitution here. In both situations, there is not the slightest indication that Congress "closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program,"[36] (*Id.* at 420) or "that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field." (*Id.* at 422)

In *Rosado*, the plaintiff AFDC recipients had sought to enjoin, as contrary to Section 402(a)(23) of the Social Security Act, the implementation of a wholly new plan for calculating the standard of need and level of payments to AFDC families. The plan was placed into effect, after the Court refused to stay the appellate court decision reversing the trial court, and, as a result AFDC benefits under the new plan had been reduced almost

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[36]Contrary to petitioner's representation (Pet. Br. 19), H.R. 16311, 91st Cong., 2d Sess. C.169-170 (Comm. Print. Nov. 5, 1970, Senate Comm. on Finance) did not purport to give a "right of retroactive assistance to welfare recipients," but instead would have given HEW the authority to require retroactive payments to eligible persons denied such benefits. Because this provision did not pass, and HEW has no such authority, there is even stronger grounds than in *Rosado* to conclude that Congress has not "closed the avenue of effective judicial review to those individuals most directly affected . . ." *Id.* at 420.

forty million dollars. *Rosado, supra* at 416-17. After deciding that the New York new plan did violate the requirements of 402(a)(23) of the Social Security Act, the Court then addressed the question of the proper relief. *Rosado, supra* at 420-423.

In view of the fact that New York had already implemented its drastic revision of the entire AFDC program, and that the Court had declared such revision to be contrary to federal law, the Court fashioned the only appropriate remedy under the circumstances–an injunction against the payment of federal monies according to the revised plan, should the state not develop a conforming plan within a reasonable period of time. As presented to the Court, there was no prayer for equitable restitution, and accordingly, the Court did not consider the propriety of such a remedy.[37] Certainly there is nothing in the opinion to support the conclusion "that there are both constitutional and federal statutory bars to retroactive awards being granted to welfare recipients." (Pet. Br. 17-20)

On the contrary, the numerous later affirmances by this Court of decrees granting equitable restitution of benefits wrongfully denied[38] support the conclusion that the federal courts may exercise their inherent equitable powers in fashioning appropriate equitable remedies, including restitution, to enforce compliance with the Social Security Act and to give effect to its purposes.

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[37]On remand, the plaintiffs sought retroactive benefits, but such relief was held to be barred by the mandate of the Supreme Court. *Rosado v. Wyman*, 322 F.Supp. 1173, 1195-96 (E.D. N.Y. 1970). No appeal was taken on this aspect of the decision.

[38]*State Department of Health and Rehabilitative Services v. Zarate*, 407 U.S. 918 (1972) *aff'g* 347 F. Supp. 1004 (M.D. Fla. 1971); *Sterrett v. Mothers and Children's Rights Organization*, 409 U.S. 809 (1972); *Weaver v. Doe*, 404 U.S. 987 (1971) *aff'g* 332 F. Supp. 61 (N.D. Ill. 1971).

Such equitable discretion is wholly parallel to that exercised by the federal courts under the Emergency Price Control Act (*Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)), and under the Fair Labor Standards Act (*Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960)).

**B. Granting Equitable Restitution to Members of the Plaintiff Class Was Appropriate and Necessary to "Redress" the Deprivation of Federal Rights Pursuant to the Congressional Mandate in Section 1983.**

Supplemental to the court's traditional equitable powers, the lower court here was acting pursuant to the congressional mandate in 42 U.S.C. §1983 which refers to a proceeding for "redress" of the deprivation of federal rights. In *Mitchum v. Foster*, 407 U.S. 225, 239, 242 (1972), the Court stated:[39]

> "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."
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> * * * * *
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> "The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . ."

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[39]In *Mitchum v. Foster, supra* at 239 n.30 (1972), a representative is quoted who described his perception of the problem to which the predecessor to 1983 was adopted in terms that are quite descriptive of the facts of this case.

> " 'The principle [sic] danger that menaces us today is from the effort within the States to deprive considerable numbers of persons of the civil and equal rights which the General Government is endeavoring to secure to them.' "

In *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), this Court held that Section 1983 and its jurisdictional counterpart, Section 1343(3), were enacted to provide sweeping protection to basic civil rights, rejecting any distinction between personal and property rights. Further, the Court noted that by these sections Congress "intended to provide a federal judicial forum for the *redress* of wrongful deprivations of property by persons acting under color of state law." *Id.* at 543 (Emphasis added.) Specific reference was made to the Court's use of these sections in welfare cases (*Id.* at 551 n.19 and 20). The Court also stated that "[t]he right to enjoy property without unlawful deprivation . . . is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account." *Id.* at 552. Applying these principles to the instant case, "redress" of the deprivation of federal rights of John Jordan and other members of the plaintiff class could only be secured by equitable restitution of the AABD benefits wrongfully denied. Such relief would appear to fall within the broad protection originally contemplated by the Congress in enacting the predecessor to Section 1983. *See generally, Monroe v. Pape,* 365 U.S. 167 (1961).[40] In public assistance cases proper redress against state officials often requires equitable restitution; in school desegregation cases other equitable

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[40]In *Monroe v. Pape, supra,* at 196-97 (concurring opinion), one Senator, in discussing the predecessor to 1983, is quoted:

" 'As to the civil remedies . . . the injured party should have an original action in our Federal courts, so that by *injunction* or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights.' " (Emphasis supplied.)

remedies are appropriate; in the reapportionment cases, still other equitable remedies are adopted; and in cases involving inadequate jail and mental health facilities, other extensive equitable remedies have been fashioned against state officers pursuant to Section 1983. (See cases cited *supra* at 32) In all these cases, the courts are fulfilling the mandate of 1983, that is, to "redress" the deprivation of federal rights.

### C. The Remedy of Equitable Restitution Is Necessary To Effectuate Compliance With the Social Security Act.

The AABD program involved in this case is one of the public assistance programs that reflects "a scheme of cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). Illinois has chosen to participate in the AABD program, and has thereby accepted the concomitant responsibilities and obligations to conform to the requirements of the Social Security Act and the mandatory rules and regulations promulgated by HEW, such as those involved in this case. *Id.* Congress established an equation whereby the federal government provided substantial financial assistance to the states for the provisions of financial assistance to needy, aged, blind, and disabled persons in exchange for the state's adherence to the conditions and requirements set down by Congress and HEW. Petitioner here was fully aware of this bargain, chose to breach its obligation to members of the plaintiff class, and now seeks to benefit from his own wrong and to avoid financial accountability to the plaintiffs for AABD benefits wrongfully withheld. Respondent public aid recipients submit that if the remedy of restitution is not available under the circumstances of this case, state welfare officials across the country will be encouraged to

flaunt paramount federal law, as was done by the former director of public aid in this case. Only by upholding the remedy of restitution will the necessary incentives to comply with the mandates of federal law be established.[41]

Recognizing the remedy of equitable restitution as a means of effectuating compliance with a particular Act of Congress is found in other areas of the law as well. As discussed *supra* at 53-54, in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), restitution of excess rents paid in violation of the Emergency Price Control Act was "considered as an order appropriate and necessary to enforce compliance with the Act." *Id.* at 400. "Future compliance may be more definitely assured if one is compelled to restore one's illegal gains . . ."[42] *Id.*

In *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292-93 (1960), the Court also recognized restitutionary relief as a means of effectuating compliance with the Fair Labor

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[41]The Solicitor General, in his petition for certiorari in *Butz v. Carter*, No. 73-546 at 14, involving violations of The Food Stamp Act, similarly argues that the "[l]ack of an appropriate judicial remedy to enforce State responsibility will only encourage additional State laxity."

[42]The Court also noted that

> "the statutory policy of preventing inflation is plainly advanced if prices of rents which have been collected in the past are reduced to their legal maximums." *Porter v. Warner Holding Co.*, 328 U.S. at 400.

This decision was rendered in 1946, while the excess rents were paid in 1942 and 1943. In the same way, payments of AABD benefits now to the plaintiffs will serve the policy of aiding the needy, even though the original payments should have been made a few years ago.

Standards Act in cases involving retaliatory discharges. Similarly, in other FLSA suits, restitutionary injunctions to restrain the withholding of unpaid minimum wages or overtime compensation, are granted to deter violations thereof (*Hodgson v. Taylor*, 439 F.2d 288 (8th Cir. 1971), and to deprive violators of any gains accruing as a result of their violations. *Wirtz v. Wershow Co.*, 416 F.2d 1071 (9th Cir. 1969); *Wirtz v. Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968).

These same policy considerations apply with equal validity to enforcing compliance with the Social Security Act. First, equitable restitution eliminates any possibility of financial savings to a state welfare department as a result of the knowing disregard of federal requirements. Certainly, a state public aid official should not be permitted to profit from his own wrong.[43] Otherwise,

> "state welfare officials could withhold benefits in violations of federal law until suit is brought and a

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[43] "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

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"A person is not permitted to profit by his own wrong at the expense of another." Restatement of the Law of Restitution, American Law Institute, Ch. 1, Sections 1 and 3 (1958 reprint of 1937 ed.)

In *Samuel v. University of Pittsburgh*, 56 F.R.D. 435, 440 (W.D. Pa. 1972), involving the constitutionality of a rule defining nonresidents for purposes of tuition, the court recognized that "if restitution were not available to the class the defendant would be unjustly enriched . . ."

court acts, and retain the illegal savings acquired theretofore."[44] *Jordan v. Weaver*, 472 F.2d at 992.

Second, the availability of the remedy of restitution creates both the incentive and the necessity on the part of state welfare officials for careful attention to, and compliance with, paramount federal law when adopting and enforcing state rules and regulations.[45] The notorious laxity of state welfare officials in this area is documented by the numerous cases voiding state welfare provisions clearly in violation of federal law, and the necessity oftentimes to institute repeated litigation to enforce the same provision of the Social Security Act.

For example, in *Lawson v. Brown*, 349 F. Supp. 203 (W.D. Va. 1972), the court invalidated the obviously illegal state provision denying AFDC to needy families with sixteen and seventeen year olds who were not in school. However, the Virginia Department of Public Aid continued to adhere to its illegal policy in disregard of federal law. In *Frye v. Lukehard*, 361 F. Supp. 60 (W.D. Va. 1973), the policy was again challenged, and this time

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[44]Similarly, in *Alvarado v. Schmidt*, 317 F. Supp. 1027, 1042 (W.D. Wis. 1970), the court observed that

> "to deny AFDC recipients payments to which they are legally entitled and which the state wrongfully withheld would be to allow a state to operate the AFDC plan that violated federal statutory requirements with financial impunity."

To the same effect, *Alexander v. Weaver*, 345 F. Supp. 666, 673 (N.D. Ill. 1973); *Schaak v. Schmidt*, 344 F. Supp. 99 (E.D. Wis. 1971).

[45]In asking for statutory authority to require states to restore benefits wrongfully denied, HEW has recognized such a remedy to be a means of obtaining compliance with the requirements under the Social Security Act. H. Rep. No. 231, 92d Cong., 1st Sess., pp. 205-206.

the court granted restitution to members of the plaintiff class. Similarly, in *Story v. Roberts*, 352 F. Supp. 473 (M.D. Fla. 1972), the Florida welfare department continued to apply a state regulation requiring AFDC applicants, as a precondition to eligibility, to prosecute a civil action for support of their children. This type of state requirement had already been clearly held to be contrary to the Social Security Act in *Meyers v. Juras*, 327 F. Supp. 659 (D. Ore. 1971), *aff'd* 404 U.S. 803 (1971), *reh. denied* 404 U.S. 961 (1971); *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal. 1971) *aff'd* 404 U.S. 980 (1971); *Doe v. Swank* 332 F. Supp. 61 (N.D. Ill. 1971), *aff'd sub nom. Doe v. Weaver*, 404 U.S. 987 (1971), and was contrary to federal regulations, yet Florida persisted, as in this case, in disregarding federal law. Under these circumstances, the court concluded that federal interests under the Social Security Act would be served by requiring restitution of all public assistance benefits wrongfully denied.

Yet another example is *Silvey v. Roberts*, ___ F. Supp. ___ (M.D. Fla. Aug. 3, 1973) in which the court invalidated the defendant welfare department's policy of not granting notice and a hearing prior to termination and reduction of excess medicine grants. The court explained why restitution was in furtherance of congressional purposes.

> "First of all, the defendants' policy . . . was a patent violation of the 'fair hearings' regulation which was published on February 13, 1971 and which went into effect as of April 14, 1971. The defendants were at least grossly negligent in not complying therewith. Granting retroactive benefits will serve to deter the defendants from engaging in similar violations in the future. The second congressional interest, that of promoting the federal policy of

> satisfying the needs of impoverished persons, will be fulfilled since only those members of the class who were forced to incur expenses for payment of needed medicine will be granted retroactive payments. Third, the congressional interest of insuring that federal funds are used properly is obviously satisfied since they were wrongfully withheld in the first place . . . The equities of the situation dictate that retroactive payments are appropriate in this particular case . . . . Since the HEW 'fair hearing' regulations went into effect on April 14, 1971, the defendants are directed to provide benefits retroactive to that date." Slip op. at 11-12.

In short, only by granting restitution does it become crystal clear that paramount federal law must be strictly observed, and that violations thereof will be counterproductive for the state.

On the other hand, if the remedy of restitution is not available, public welfare officials will learn the valuable lesson that federal law can at all times be violated and disregarded with impunity, and substantial cost savings in state welfare budgets can be achieved by ignoring federal laws. This is hardly a precedent to effectuate compliance with the Social Security Act and regulations thereunder. In other words, adherence to the federal requirements under the Social Security Act is promoted only if this Court clearly announces that restitution of benefits wrongfully denied is an available remedy for violations of federal law. Otherwise, the force of federal law in this area is seriously undermined. Certainly, neither the unlikely possibility of a statutory cut-off of federal funds nor the possibility of prospective injunctive relief serves as a meaningful deterrent to state violations of federal law. For this reason it is clear that only the availability of a restitutionary remedy will serve to foster and encourage

strict compliance with federal requirements, and to deter violations thereof, whether such violations be deliberate, as in this case, or otherwise.

In conclusion, respondent public assistance recipients submit that if this Court holds that restitution is precluded by the Social Security Act or some other bar, there will continue to be flagrant and widespread violations of the Social Security Act, and the paramount congressional interest in providing assistance to needy eligible persons will be substantially undermined. On the other hand, by affirming the power of a court of equity to fashion effective remedies, including equitable restitution to redress the deprivation of federal rights, this Court will create the essential incentives for state welfare officials to comply with federal requirements under the Social Security Act.

### D. The Seventh Circuit Did Not Err in Upholding the Decree Requiring Equitable Restitution to Members of the Plaintiff Class Under the Circumstances of This Case.

In this case federal law concededly required AABD applications to be processed within maximum time standards, and, in those cases where they were not, eligible AABD applicants, such as the members of the plaintiff class, were to be furnished assistance as of the last day of the maximum permissible time period. The former Director of the Illinois Department of Public Aid was aware of these requirements. (App. 85-89) Yet he chose to ignore them beginning July 1, 1968, and persisted in this violation up to and even after the federal provisions were upheld and the Illinois provisions in contravention of federal law were held void in *Rodriguez v. Swank,* 218 F. Supp. 289 (N.D. Ill. 1970) (order at

App. 22-29). These facts in support of the decree of equitable restitution are far more compelling than those presented in other public assistance decisions granting restitution which this Court previously affirmed. *State Department of Health and Rehabilitative Services v. Zarate*, 407 U.S. 918 (1972), *aff'g* 347 F. Supp. 1004 (D. Fla. 1971); *Sterrett v. Mothers and Children's Rights Organization*, 409 U.S. 809 (1972), *aff'g* unreported judgment (N.D. Ind. 1972); *Doe v. Weaver*, 404 U.S. 987 (1971), *aff'g* 332 F. Supp. 61 (N.D. Ill. 1970); *Gaddis v. Wyman*, 304 F. Supp. 717 (S.D. N.Y. 1968) (order at par. 10,506 Transfer Binder, CCH Pov. Law Rptr.), *aff'd per curiam sub nom. Wyman v. Bowens*, 397 U.S. 49 (1969).

Moreover, this case presents a clear example of state official disregard for the supremacy of federal law. In contrast to *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), the federal interest in deterring this kind of disregard of federal law, standing alone, is sufficient to justify the restitution provisions of the decree.[46] As is discussed at length in the

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[46]In *Rothstein, supra*, the plaintiffs challenged the geographical differential in amount of aid payments between the City of New York and the seven-county area adjoining it. After a preliminary order (303 F. Supp. 339), the Commissioner of Welfare raised benefits for public assistance recipients in the seven-county area. After this decision was appealed to the Supreme Court and vacated and remanded on other grounds, *Wyman v. Rothstein*, 398 U.S. 275 (1970), the case was again heard on the merits and decided in favor of the plaintiffs. *Rothstein v. Wyman*, 336 F. Supp. 328 (S.D. N.Y. 1970). Only after this decision did plaintiffs first seek restitution, and a year later such relief was granted. (Unreported opinion) The Second Circuit, in *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1967) rejected this relief for the reason that under the circumstances of the case such relief did not assist the effectuation

previous section, by upholding the decree of equitable restitution in this case the Seventh Circuit has established a meaningful deterrent to violations of the requirements under the Social Security Act. On the other hand, if the restitution provisions in this case were not upheld, the petitioner would then derive a financial benefit from the violation of federal law. In this case, in particular, in view of the earlier litigation in *Rodriguez*, this consequence is unacceptable. Certainly it is appropriate for a court of equity to eradicate the financial savings accruing from violating the law.

In addition, the Seventh Circuit's affirmance of the restitution provisions, is wholly justified insofar as a court of equity must weigh the equities as between the parties. On this balancing scale, all of the equities support the plaintiffs-respondents. They are needy aged, blind, and disabled persons who were entitled to financial assistance for the basic necessities of life, and who were

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of federal welfare policies. The Second Circuit stressed that there was no showing that the state welfare commissioner knew that his actions were in violation of federal law and no showing of a lengthy course of unlawful conduct. This is in contrast to this case where the director of the Department of Public Aid was fully aware of the illegality of his regulations and persisted in enforcing them for almost three years. (App. 85-89) As a result of this major difference, the court in *Rothstein* did not view the congressional interest in deterring violations of the Act to be furthered by restitutionary relief; on the other hand, the Seventh Circuit in *Jordan*, recognized the clear deterrent effect of the restitutionary remedy in this case and the necessity therefor. Moreover, in *Rothstein* in the absence of any evidence of knowing denial of benefits, the court did not think the equities, as between the parties, was conclusive. While respondents do not necessarily concur in that weighing of the equities, in this case, in view of the knowing illegal denial of benefits, the equities are overwhelmingly on the side of the respondents in support of restitution.

knowingly denied such benefits in contravention of federal law. On the other hand, the state welfare director knew that federal law was binding, that it was being violated, and that the consequences of the violation were to deprive plaintiffs of their federal entitlement. His hands were indeed far from clean.[47] Indeed, the equities are so overwhelmingly in favor of the AABD recipients in this case that the defendants abandoned on appeal all arguments based on the equities and instead have only interposed technical defenses that would bar any and all restitution. Certainly, the Seventh Circuit in this case, in affirming the judgment below, did not err, as a matter of law.

An instructive analogy in weighing the equities is found in the cases involving the unlawful withholding of unpaid minimum wages or overtime compensation. In such cases, as in public assistance cases, there is an unquestioned right to receive, in the first instance, certain monies, but such sums are unlawfully withheld. In these FLSA cases, the courts have concluded the equities tip significantly in favor of equitable restitution to the employees of monies unlawfully withheld. *Schultz v. Mistletoe Express Service, Inc.*, 434 F.2d 1267 (10th Cir. 1970); *Schultz v. Parke*, 413 F.2d 1364 (5th Cir. 1969). In comparison, *a fortiori*, the equities are in favor of granting equitable restitution of statutory entitlements to the needy aged, blind, and disabled vis-a-vis the errant department of public aid.[48] As concluded in *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 296 (1960), there would

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[47]See footnote 43, *supra* p. 62.

[48]To the extent that the withholding by employers of minimum wages and overtime pay in violation of the Fair Labor Standards Act is deemed to be a "continuing public offense," (*e.g. Wirtz v. Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968), and recovery of such monies is a vindication of a public right, the withholding of AABD

seem to be "doubtless little room for the exercise of discretion not to order reimbursement . . ."

Finally, respondent AABD recipients would emphasize to the Court that the receipt of AABD benefits *nunc pro tunc* by members of the plaintiff class will fulfill the paramount congressional goal of providing subsistence payments to the needy aged, blind, and disabled. Because of the inadequate amount of the grant, basic needs are often unmet even when the full amount of the grant is timely received. (John Jordan's allowance for food was $26.56 per month, and $6.38 for clothing. [R. Item 46, F-40]) Restitution to John Jordan, and others, will merely give them assistance to pay off debts or to purchase needed major items, such as clothes, the money for which is supposed to be saved somehow over a number of years. (See Exhibit B, attached hereto, Monthly Budget Chart/Budgeted Clothing Items.) To persons living on welfare grants, restitution of benefits wrongfully denied is not a windfall, but merely a possible means to meet current needs, long postponed. The interests of federalism inherent in the AABD program require, at a minimum, that participating states furnish assistance in accord with federal requirements. As the Seventh Circuit stated:

> "Since the State of Illinois obligated itself to follow federal law in disbursing welfare assistance, it cannot cogently complain that having to make those payments now, which federal law required it to make in

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benefits from needy aged, blind, and disabled persons should be viewed as a "continuing public offense," the vindication of which is a public right. This Court has recognized that the providing of financial assistance to the needy to secure the basic necessities of life is part of the "Nation's basic commitment" under our Constitution. *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

> the first place, will wreak fiscal disruption. In accepting the federal assistance program, the state must have calculated the cost of compliance."[49] 472 F.2d at 993.

In summary, then, the decision of the Seventh Circuit, in upholding the restitution provisions of the court below, properly concluded that such relief would assist in effectuating compliance with the federal requirements under the Social Security Act, and would further the paramount congressional purpose of furnishing needy elderly, disabled, and blind persons with their statutory entitlements. Further, the Court properly concluded that such relief was warranted on the basis of the equities between the parties.

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[49]This quote fully answers petitioner's argument that the relief here will interfere with state budgetary processes. (Pet. Br. 35-37) The spectre of "bankruptcy of the State, or the exhaustion of available revenues" is wholly without foundation in the record. Just as the payment of restitution in *Rodriguez* did not present a problem, none will be presented if the decree below is affirmed.

## CONCLUSION

For all the foregoing reasons, respondents respectfully request this Court to affirm the judgment of the court below.

Respectfully submitted,

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EXHIBIT "A"

A-2331

Handbook of Public Assistance Administration

(Additional Provisions Relating to the 1950 Amendments to the Social Security Act)

| Part IV. | Eligibility and Payments to Individuals | |
|---|---|---|
| A-2000-2999 | Eligibility | 11/14/51 |

A-2331. Requirements

State plans must

1. Specify a time period to serve as a standard of reasonable promptness for completing the application process in all but exceptional cases. If the period established as the standard of promptness for application for old-age assistance, aid to the blind, and aid to dependent children is longer than 30 days, and for aid to the permanently and totally disabled longer than 60 days, the submittal must be accompanied by (a) a statement justifying the necessity for the longer period, and (b) a statement as to the action the State proposes to take to remedy any hindering conditions, and when it will put such action into effect.

2. Provide for informing claimants (a) of the agency's standard of promptness so that each may know the time period within which he should expect action on his claim, and (b) of his right to request a hearing on the basis of the promptness requirement if action is not taken within the specified period to furnish assistance or notify him of his ineligibility.

# EXHIBIT "B"

Illinois Department of Public Aid

## MONTHLY BUDGET CHART

The Allowances in Sections I and II are to be used for active persons; those in Section III are for bedfast adults. See Section V for adults in group care.

| I. AABD | Number of Persons in Household | Total Personal Allowance | Food | Clothing | Household Supplies | Personal Essentials |
|---|---|---|---|---|---|---|
| Adult | 1 | $49.03 | $30.38 | $ 6.88 | $2.01 | $9.76 |
| | 2 | 44.95 | 27.85 | 6.88 | 1.60 | 8.62 |
| | 3 thru 7 | 42.17 | 25.32 | 6.88 | 1.35 | 8.62 |
| | 8 or more | 41.54 | 24.89 | 6.88 | 1.15 | 8.62 |

AABD (B)–For blind minors under 18, use children's allowances in Section II for food, clothing, and personal essentials.

| II. ADC | | | | | | |
|---|---|---|---|---|---|---|
| Adult | 2 | 44.71 | 29.75 | 7.50 | 1.60 | 5.86 |
| | 3 thru 7 | 41.74 | 27.03 | 7.50 | 1.35 | 5.86 |
| | 8 or more | 39.56 | 26.57 | 7.26 | 1.15 | 4.58 |

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| III. BEDFAST | | | | | | |
|---|---|---|---|---|---|---|
| Adult | 2 | 34.54 | 25.85 | 3.34 | 1.60 | 3.75 |
| | 3 thru 7 | 31.92 | 23.48 | 3.34 | 1.35 | 3.75 |
| | 8 or more | 31.37 | 23.13 | 3.34 | 1.15 | 3.75 |

## IV. DIET ALLOWANCE FOR NORMAL PREGNANCY

Family of 2 – $4.38 – Family of 3 or more - $3.98

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V. GROUP CARE–Clothing and Personal Essentials Allowances for Recipients in Private and County Nursing Homes, Sheltered Care Homes, Homes for the Aged:

| | Adults | |
|---|---|---|
| | Active | Bedfast |
| Clothing | $5.64 | $3.72 |
| Personal Essentials | 2.79 | 2.79 |
| | $8.43 | $6.51 |

Revised 9-1-72

## EXHIBIT "B-1"
## APPROXIMATE YEARLY CLOTHING ITEMS FOR EACH AGE GROUP IN THE FAMILY

| Item | 1-5 Yrs. | 6-12 Yrs. | 13-20 Yrs. | ADC Adult | AABD Adult |
|---|---|---|---|---|---|
| **OUTER GARMENTS** | | | | | |
| Winter Coats | 1/2 | 1/2 | 1/2 | 1/5 | 1/6 |
| Everyday Outfits | 3 | 3 | 3 | 2 | 2 |
| Spec. Outfits | 2 | 1 | 1 | 1-1/2 | 1 |
| Sweaters | 1/2 | 1 | 1/2 | 1/4 | 1/3 |
| **UNDERGARMENTS** | | | | | |
| Underwear | 7 | 3 | 3 | 1 | 2-1/2 |
| Nightclothes | 2 | 1-1/3 | 1-1/3 | 1-1/4 | 1 |
| **FOOTWEAR** | | | | | |
| Shoes - Oxfords | 3 | 2 | 2 | 2 | 1 |
| Gym | 1 | 3 | 3 | House-shoes 1/6 | House-shoes 2 |
| Hose | 8 | 8 | 8 | 7 | 7 |
| Overshoes | 1/2 | 1/2 | 1/2 | 1/3 | 1/4 |
| **ACCESSORIES** | | | | | |
| Mittens or gloves, belt, ties, handkerchiefs, head covering | $1.91 | $3.94 | $6.67 | $6.12 | $5.38 |
| **MISCELLANEOUS** | | | | | |
| Clothing Care and Upkeep | – | $1.44 | $4.56 | $7.90 | $7.40 |